



THE INDIAN LAW REPORTS.

BOMBAY SERIES,

CONTAINING

CASES DETERMINED BY THE HIGH COURT AT BOMBAY AND
BY THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL
ON APPEAL FROM THAT COURT.

REPORTED BY

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High Court ... { W. E. HART, *Inner Temple.*
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JUDGES OF THE HIGH COURT.

THE HONOURABLE SIR MICHAEL ROBERTS WESTROPP, *Knight, Chief Justice.*

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A TABLE
OF THE
NAMES OF THE CASES REPORTED
IN THIS VOLUME

PRIVY COUNCIL

	Page
Cowasjee Nanabhai v. Lalbhoy Vullabhai	458
Damodar Gordhan v. Deoram Kanji	367

ORIGINAL JURISDICTION

CIVIL

Abbá Hápi Ishmáíl v. Abbá Tharv	253
Anandji V. Ram v. The Narmad Spinning and Weaving Company	320
Bakaji Salaji v. Bapu Saju	550
Chová Kír v. Isá ben Khalifa	209
Dayál Jairáj v. Jivaráj Rutvási	237
Háji Jakariá v. Háji Qasim	496
Hearn v. Bapu Saju Nukim	505
Hariji Jins v. Niran Mulji	1
Mukhand Johatimul v. Suganchand Shyvdas	23
Manchery Káwasji Dávir v. Matimbái	506
Mániklál Atmarám v. Munchersha Dinshá	269
Muráji Gekuldas v. Parvatibái	177
Náthá Hirí v. Janardhan Rámáchandra	503
Pratáp Daji v. The Bombay, Baroda and Central India Railway Company	25
Shepherd v. The Trustees of the Port of Bombay	132, 477
Sumar Ahmed v. Háji Ishmáíl Hápi Haleb	158
The Secretary of State for India v. Sir Albert Sassoon	513

CRIMINAL.

Reg. v. Lalubháí Gopáldás	282
Reg. v. Vithaldás Pránjivandás	102

ECLESIASTICAL.

Venárez Rámáchandra, *In re*

TABLE OF CASES CITED IN THE VOLUME.

	Page
Abaji Sankroji Bhale v. Nings Bhale	535
Abel v. Lee	73
Abley v. Dale	79
Abrahams v. The Mayor, Aldermen, and Citizens of London	175
Abdul Gani v. Krishnaji	549
Aldous v. Cornwell	371
Alhusen v. Margarejo	31, 32, 33
Amann v. Dunlop	135
Amerson v. Bigham v. Amerson Khay	288, 324, 527
Ananta v. B. K. K.	554
Anglo-Meyersham Coy. Ltd.	325
Annapur Thakur Chaudhary	19
Apa v. Jadhav	61
Appel v. Ramaswami Aiyar	106
Ardasoor Chatterjee v. Bhatnagar	166
Ardasoor Jahangir Bhang v. Arzhan	167
Arjun v. Bhandari	61
Asgur Ali Shikhan v. Mathuramath Ghose	192
Ashbury Railway Carriage and Iron Company v. Riche	526, 527, 531, 537
Attorney General v. South Sea Company	385
" v. Warner	185
" v. Pembroke Hall	274
" v. Hungerford	382
Atwood v. Crowdie	47

B

Babaji v. Nana	638, 639
Babaji v. Kajariam	203, 211, 222, 233
Baboo Beer Krishno Sahye Sing v. Baboo Har Ballub Narain Sing	323
Baboo Beer Partab Sahoe v. Maharaja Rajender Partab Sahoe	305, 341
Baboo Bodhnarain Sing v. Baboo Onarao Sing	184
Baboo Kooladeep Narain Sing v. Mahadeo Sing	338
Baboo Lekhaji Roy v. Kanhya Sing	541, 541
Baboo Nund Coomár Lall v. Moulvi Bazeooddeen Hossain	383
Bai Mahkor v. Bulakhi Chaku	345, 347
Bai Ratan's Case	321
Balaram Nemchand v. Appa Dula	

Dalvantswar Bhaskar v. Dayabai	201
Bank of Utica v. Smith	40
Barkhatullah v. Remue	80
Barnes's Banking Company	509
Barnett v. Allen	100
Bashetiappa v. Shivlingappa	100
Bates v. Johnson	100
Beattie v. Jetha Durgare	100
Beckett v. Howe	100
Bekana Tirth v. Vachaspathi Chandra	100
Bholanath Khatri v. Kish Prasad	100
Biddell v. Tarachurn Banerjee	100
Birks v. Allison	100
Blagg v. Sturt	100
Bland v. Crowley	100
Bolland v. Brgrave	100
Borthwick v. Wahan	100
Bosquet v. Duham	100
Brassington v. Llewellyn	100
Bray v. Bray	100
Browne v. McClintock	100
Brindabund Chunderroy v. Tarachand Banerjee	100
Bruce, <i>ex parte</i>	100
Bulfeel, <i>ex parte</i>	100
Burton v. Great Northern Railway Company	100
Butler v. Fox	100

C

Cachar Company	100
Cailland v. Champion	100
Calvin's Case	100
Campbell v. Hall	100
Carter v. Carter	100
Cassill v. Dowes	100
Cartwright v. Shepherd	100
Catton v. Simpson	100
Chengulva Raya Mudali v. Tharatchi Ammal	100
Cherry v. Thompson	100
Chinnasami Iyengar v. Gopala Chetty	100
Chintamani v. Shivrana	100
Chintamani Pal v. Pyari Mohan Mookerjee	100
Church v. Brown	100
Clark, <i>ex parte</i>	100
Clayton's Case	100
Clissold v. Clissold	100
Collector of Ratnagiri v. Naro Dhandoo	100
Collector of Surat v. Dhursingji	100
Coomanul v. Samo Rawr	100
Cooper v. Hockett	100
Cornill v. Hudson	100
Corporation of Exeter v. Earl of Devon	100
Cowar Rajkumar Ray v. Cowar Kali Krishna Roy	100
Coxhead v. Richards	100
Cranvassammi v. Vijayammal	100
Creskew v. Fletcher	100
Croft v. Croft	100
Curre v. Mita Ram Chetty	100

	Page
335, 338	
147	
155	
187	
220, 224, 261	
57	
40	
319	
30, 52	
139	
424	
323, 328	
124	
30	
540	

with

Eastern Canada Railway Company - Montreal	85
Johnston & Co. - Montreal	288
Johnston & Co. - Montreal	69
Johnston & Co. - Montreal	240
Johnston & Co. - Montreal	446
Johnston & Co. - Montreal	326
Johnston & Co. - Montreal	209, 213
Johnston & Co. - Montreal	172

1

Fattah Chand Sahu v. Leekunber Singh	102
Felgate's Case	374
Financial Corporation, <i>re</i>	334, 331
Fischer v. Popham	540
Forbes v. Meer Mahomed Tagore	549
Francis v. Hortonaji	205
Furdousji v. Cursetji Dinshaw	174

4-70

Gangá Govind v. Collector of 24 Parganas	288, 697
Gáthá Rám v. Moodatá	165
Ghelañhái v. Prangivan	679, 680
Gibson v. The East India Company	383
Giles v. Perkins	42
Girdhárce Lál v. Kantoo Lál	262, 265, 267
Glyn v. Caulfield	498
Gopeckishen Goshameo v. Brindabachunder Sircár	592
Gouroo Churn Bose v. Bykuntath Acharjee	21
Gouree Sunkur Tribedee v. Arman Ali Chowdhry	69
Govind v. Naráyan	260
Graham v. Graham	276
Great Northern Railway Company v. Harrison	28
Great North of England Railway Company v. The Clarence Railway Com-	125
pany	

	Page
Grindában Chander Roy v. Tara-band Bunde-padhya	294
Guddalur v. Kunnattur	338
Guduri v. Rapaka	201
Gulábdás Jagjivandás v. Lahitarám Atmarám	205
Gundo v. Mardan	579, 580
Guravi v. Guravi	266
Gwillim v. Gwillim	549, 550
Gyan Chan v. Jawahur	131

H

Hadjee Ismail Hulbech v. Hajjee Mahomed Hajjee Ismail	42
Hall v. Green	13
Hanoonman Pershad Panday v. Mussamut Baboo Munraj Koonwera	205
Hargopal Premnolás v. Abdul Khan Haji Muhammed	592
Hargovandás v. Bálcrishna	191, 195
Haridás v. Gamble	199
Harjivandás v. Bhagvándas	31
Harnamgir v. Spiers	575
Harris v. Amery	554
Harrison v. Bash	486
Hartland v. General Exchange Bank	469
Hartley v. Commings	470
Heckford v. Garstin	484
Heerálál Bose	84
Hemp v. Garland	130
Hempammal v. Hanuman	305
Her Highness Ruckmábat v. Lulloobhoy Mottichund	258
Hernaman v. Smith	38
Hill v. Campbell	499
Hirji Jina v. Narran Mulji	162
Hockley v. Bantock	240
Hanooman Dutt Roy v. Bhag But Kishen	231
Hooper, <i>ex parte</i>	240
Hulloobur v. Hogg	128
Hurronauth Roy v. Maheroolah Moollah	127
Huth v. Long	35

I

Iliott v. Genge	549
Inchbald v. The Western Neilgherry Plantation Company	469
Inglesant v. Inglesant	549
Itcharam Dayáram v. Ráiji Jaga	318

J

Jackson v. Spittal	30
Jackson v. Wooley	308
Jagardhan Pandurang v. Gopal Pandurang	555
Jayram Gossau v. Kali Narayan Roy	193
Jannissa Begam v. Manekji Karsetji	305
Jeebraj Sing v. Indrajit Mahoon	540, 541, 544, 545, 547
Jivandás v. Bramp	191
Jonab Ali v. Ghundee Chann	545
Jott v. Bala	94

3522

Page

4

Lakshmi Narayan Singh v. Tej Narayan Singh	856
Laljeet Singh v. Riji near Suez	866
Lawless v. The Anglo-Egyptian Cotton Company	113, 483
Le Neve v. Le Neve	240
Logan, <i>ex parte</i>	469
Lokenáth Ghose v. Jugbandhoo Roy	609
Lopez v. Deacon	498
Lopez v. Maddy Thakoor	41
Luckinchood v. Zarawurmull	82
Lyle v. Richards	521
MacIntyre v. Belcher	469
Maclure, <i>ex parte</i>	469
Madrid Bank	324
Máhábalajá v. Timaya	96
Máhád v. Durr	191, 199, 196
Mahārání Fatesangji v. Desai Kallantappa	206
Mahabeer Persád v. Ramyad Singh	264
Maleshappá v. Hassappá	575
Maichargi Sorabji Chulla v. Kongseo	281
Marchmont v. Marchmont	185
Marson v. Petit	206
Master v. Miller	526
Mathurádas v. Kaha	566
Midland Railway v. London and N.-W. Railway	126
Milford v. Milford	166
Milner v. Milner	166
Mohesh Chunder Roy v. Chunder Mohun Roy	177
Mohummud Zaheer Ali Khán v. Thákeerasen Butta Koer	206
Molakatalla Naganna v. Pedda Narappá	206
Moon v. Durdun	206

M

	Page
Moonshee Buzloor Ruheem v. Shams-unness Begum	166
Mothoormohun v. Jadoonotay Doss	34
Motichand Jaichand v. Dattabhai Pestonji	545, 547
Mohun Sing v. Channu Rai	162
Muddun Gopal Lal v. Mussamut Gowramditty	264
Muddun Thakoor v. Kanto Lal	231, 265
Mudho Sing v. Thakoor Pershad	131
Muhammad Yussuf v. Sayid Ahmed	636
Mrimoyee Datta v. Bhobomoyee Datta	250
Mulchand Gulabchand v. Mishay	6
Mulchand v. Girdhar	592
Mulkern v. Ward	135
Mulraz Lachma v. Chalekany Venkata Ramu Jagannatha Row	643
Muráji Gokuldas v. Parvatibai	558
Murray v. Walter	497
Mussumot Bhagbutti Dace v. Chawdry Bolanath Thakur	587
Muttusawmy v. Venkateswara	117
Muttuvelayuda Pillai v. Paraskti	553
Muttyloll Seal v. Annundochunder Samel	335, 336, 338

N

Nágalutchee Ummal v. Gopso Nandaraja Chetty	643
Nánabhai v. Tukaram	501
Nánhoon Sing v. Tofinee Singh	120, 540, 544, 545, 547
Naráin Dhara v. Rakhal Gani	118
Nárainee v. Nurroohurry	209
Naráyanappa v. Bhashkar	130
Narrottam Jagjvan v. Narsandas Harikishendás	643
Narsing v. Bidyádharee	21
Navalmal v. Dhandibi	130
New Brunswick, &c., Company v. Boero	323
Newport Local Board of Health v. The Newport Dock	517
Ninganagavda v. Satyangavda	532, 533
Nobee Kishen v. Shib Pershad	546
Norris v. Wilkinson	241
Nugur Mull v. Azeemoolláh	50

O

Oakes' Case	324
Oldreave v. Puckridge	291
Ola, Lead, &c., Company	324
Osborne v. Gillett	147
Overend Gurney & Co., <i>in re</i>	329

P

Painter v. The London, Brighton, and South Coast Railway Company	135
Pachandas v. Dhonda	576
Pachandas v. Mohram	630
Pado v. Bingham	302
Pandi Nayudu v. Bangaru Nayudu	180

Paretti v. Bhiku	101
Patent Floor Cloth Company, Limited v. The London and North Western Railway Co.	102
Pattinson v. Mackley	103
Peachy v. Duke of Somerset	104
Perceval v. Frampton	105
Pershad Sing v. Khanna Mahomed	106
Petre v. Petre	107
Peto v. West Ham Corporation	108
Philadelphia Railway Co. v. The Pennsylvania Railroad Co.	109
Philip v. S. J. J.	110
Pilcher v. Hargrave	111
Pilkington v. S. J. J.	112
Plant v. Keble	113
Potter v. Brown	114
Powell v. Powell	115
Prasannaiah v. Subbarao v. Perumal	116
President and Scholars of the College of St. Mary, Magdalen, London v. The Attorney-General	117
Prickett v. Banger	118
Prosunmáth Dutt v. Juddahul Khan	119
Prudential Life Assurance Company v. Knott	120

Queen v. Gur Baksh	121
Do. v. Jugat Mal	122
Do. v. Kulkarni	123
Do. v. The Leeds and Bradford Railway Co.	124

Radanath Dass v. Gish	125
Do. v. Scott King	126
Rahi v. Govind	127
Raji Norostam v. Parshottam Ghar	128
Raja Bardakant Roy v. Brakham v. Roy	129
Raja Nilamoy Sing Dey Bahadur v. Kasey Chandra Lalita Bahadur	130
Raja Parthev Sing v. Rance Raj Kasey	131
Raja Ram Tevar v. Luchman Persad	132
Rajendar Prasad Sahoo v. Bhawanilal Sengupta	133
Ramabai v. Appa	134
Ramchandra v. Nandhi	135
Ramchandra v. S. J. J.	136
Ramchandra Bapji v. Yashwantrao	137
Ram Krishna Munda v. Pawan Santa	138
Ram Sahay Sing v. Kailash Chandra	139
Ramesur Mitter v. Kankalal	140
Rane v. Rane	141
Ranganathan v. Kishinath	142
Ratanchand v. Hanumantrav	143
Ravi Narayan Mandlik v. The Municipality of Ratnagiri	144
Re. v. Burdett	145
Re. v. Chatur Parthasar	146
Re. v. Chiman Bapji	147
Re. v. Chunder Bhanutacharjee	148
Re. v. Dayá Anand	149

	Page
<i>Reg. v. Gupkoni Rānu</i>	240
<i>Reg. v. Gopee Mohun Mitter</i>	149
<i>Reg. v. Govindā</i>	215
<i>Reg. v. Gulābān</i>	319
<i>Reg. v. Gurād Bēhar</i>	220
<i>Reg. v. Hariās Shāmās</i>	215
<i>Reg. v. Hayātābā</i>	86
<i>Reg. v. Hughes</i>	17
<i>Reg. v. Hulme</i>	69
<i>Reg. v. Jethā Bhalā</i>	157
<i>Reg. v. Jethā Chātrā</i>	158
<i>Reg. v. Karsan Gōjā</i>	100
<i>Reg. v. Kultaram Sing</i>	311, 330
<i>Reg. v. Lakhu Salsāhā</i>	158
<i>Reg. v. Lakshman Shanan Gubāp</i>	158
<i>Reg. v. Lalubhāi</i>	442
<i>Reg. v. Mālipā</i>	470
<i>Reg. v. Manohar</i>	110, 130
<i>Reg. v. Mohesh Bawās</i>	16
<i>Reg. v. Mudan Mohun</i>	156
<i>Reg. v. Naga</i>	16
<i>Reg. v. Nutty</i>	168
<i>Reg. v. Navranbeg</i>	311, 330
<i>Reg. v. Shipley</i>	163
<i>Reid v. Langlois</i>	478
<i>Restal v. London and South-Western Railway Company</i>	271
<i>Rhodes v. Forwood</i>	409
<i>Richmond v. New London Railway Company</i>	135
<i>Raver Bhadr Sheo Bhadr v. Rong Chucker Sanyal</i>	157
<i>Roy Meghraj v. Bāgāy Gōmī</i>	545
<i>Ruckmābāi v. Lulloobhoy Mātchund</i>	273
<i>Russell v. Russell</i>	240
<i>Buttonji Kdūljā v. Collector of Thana</i>	523, 528

S

<i>Salu v. Rāvji</i>	94
<i>Samarchand v. Haji Ismāil</i>	1
<i>Sanderson v. Symonds</i>	523
<i>Sashochellum Chetty v. Govindappā</i>	48
<i>Savalgāpā v. Basvanāpā</i>	699
<i>Sayad Abdāl v. Sayad Hasham</i>	635, 637
<i>Scott v. Nixon</i>	294
<i>Secretary of State v. Kamachee Boye Saheba</i>	383
<i>Secretary of State v. Bombay Landing and Shipping Company</i>	9
<i>Shabzadee Hazara Begum v. the Collector of Burdwan</i>	525, 529
<i>Sham Narain v. Khemajeet</i>	199
<i>Shama Churn Bose v. Bholānāth Dutt</i>	147
<i>Shama Churn Chuckerbutty v. Bindabun Chunder Roy</i>	516
<i>Shaw v. Holmes</i>	409
<i>Sheikh Bhoolloo v. Rām Narain Mookerjee</i>	31
<i>Sheikh Gaganfur Ali v. Mahomed Yaseen</i>	301
<i>Shepherd v. Whitaker</i>	483
<i>Shib Prasad v. Annapurnā</i>	199
<i>Shridar v. Narayan</i>	90
<i>Shikander Doss v. Sankaran Hanerjee</i>	201
<i>Sichel v. Borch</i>	50, 51

	Page
Sigourney v. Lloyd	41
Sims v. Direct road the Westminster Palace Hotel	324
Smith v. Smith	749
Sir Raja Papanna v. I. et al.	191
Sitaram Vasudev v. Khasabhai Daskabha	201
Sethia Urmal v. Barasani Iyer & Co.	251
Somerville v. Hawkins	400
Springhead Spinning Company v. I. et al.	139
Sri Gajapati Radhika Patra v. Sri Gajapati Nijendra Patra & Co.	107
Stace v. Stace	166
Steadman v. Arden	409
Sterling v. Mantland	470
Srinath v. Mesther Vignia Rajastala Rance Kattalajee Natchar v. Dorasinga Iyer	270
Subbalavammal v. Arima Kuthi Amma	257
Sudánund v. Hoshonahar	585
" v. Soorjo Monce	568, 544
Sudánund Mohaputtur v. Soorjo Monce Deben	264
Sufatoolli's Case	340
Surtees v. Ellison	294
Suryabhan v. Bukajee	94
Syud Mahomed Hossein v. Shuk Mutool H. I.	213

I

Tannton v. Royal Insurance Company	324
Taráchand Bose v. Nabeen Chunder Mitter	544
Taylor v. Caldwell	470
Taylor v. Rundell	497, 498
Thiagaraja Mudali v. Ramanuja Charry	540, 541
Tikandás v. Gangá	334
Thrumamagal v. Rámaswami	190
Toogood v. Spyring	486, 493
Towler v. Chaterton	303
Treuttel v. Baradon	41

U

Udárám Sitárám v. Ránu Panduji	606
--------------------------------	-----

V

Vallabhrám v. Bai Hariganga	190
Váman Janárdhan v. Collector of Thana	623, 625, 627
Vaughan v. Weldon	30
Vasudev Pandit v. Collector of Poona	530
Vencata Chella Mudali v. Sahugherry Rau	188
Vencataramanier v. Mancho Reddy	188
Vengappaiyan v. Rájápaiyan	188
Venktaráma v. Chinnathambu	195
Vinayak v. Govindrav	544
Vyskanta Bápaji v. The Government of Bombay	525

W

	Page
Wells <i>v.</i> Abrahams	147
West India and Pacific Steam Ship Company	325
Whitbread, <i>ex parte</i>	240
Whitefield <i>v.</i> The South-Eastern Railway Company	135
Whittle <i>v.</i> Frankland	470
Woodoy Chand <i>v.</i> Nitye Mandal	199
Worley <i>v.</i> Worley	276

THE INDIAN LAW REPORTS.

(BOMBAY SERIES.)

[ORIGINAL CIVIL JURISDICTION.]

SUIT No. 47 OF 1871.

Appeal No. 283.

HIRJI JINA' (PLAINTIFF) v. NA' RAN MULJI AND OTHERS (DEFENDANTS).

1875.
Oct. 1.

Account—Apportionment—Decree—Construction—Amendment of decree—Clerical error—Practice.

The decree of the court of first instance directed the Commissioner to take an account of the moneys paid by the plaintiff, during the period between 24th January 1865 and the date of the filing of the plaint, for the use and at the request of the defendants, and to allow credit to the defendants for the sums for which the plaintiff had given credit in his particulars of demand, and for all other sums for which the defendants should prove themselves entitled to credit wherever the same might have become payable. The defendants in their surcharge to the plaintiff's account claimed credit for various payments made by them to the plaintiff between 25th January 1865 and 5th July 1865. The plaintiff claimed to appropriate these payments in satisfaction of his claim against the defendants prior to 24th January 1865. The Commissioner, by his construction of the terms of the decree, held the plaintiff entitled to make such appropriation. The Judge in the court of first instance explained his decree to mean that the whole account prior to 24th January 1865 was wiped out, and directed the Commissioner that the plaintiff was not entitled to make the appropriation he claimed. *Held* that the construction put by the Commissioner on the decree was right.

Where the Court of first instance puts upon its own decree a construction, which to the Appellate Court appears to render the decree erroneous, and the decree, on the face of it, admits of another construction, which to the Appellate Court appears to render the decree correct, the Appellate Court will adopt the latter construction.

A clerical error in the decree was ordered to be amended at the hearing of the appeal.

THIS appeal from an order of Bayley, J., dated 19th December 1874, after argument on the preliminary point, whether or

1875. not an appeal lay from an order of such a nature (1), came on for
 HIRJI JINA' hearing on the merits on 1st October 1875 before WESTROFF, C.J.,
 v. NA'ARAN and SARGENT, J.
 MULJI.

The plaint, filed on 23rd January 1871, was framed on the common money counts and on an adjusted account. The written statement of the defendants raised three defences, viz., no jurisdiction, never indebted in Bombay, and limitation. On 15th December 1873, the suit came on for hearing before Bayley, J., and three issues were then framed, viz., 1st.—Is the suit barred? 2nd.—Has this court jurisdiction? 3rd.—Are the defendants indebted? The whole contest in the Court of first instance was on the question whether or not an adjustment of the account by the first defendant took place in Bombay in 1868 as alleged by the plaintiff, and to this point all the evidence recorded in the case, as well that given in Court as that taken on commission, was directed. On 20th December 1873, a fourth issue was framed by the Judge, whether the account was adjusted in Bombay by Náran Mulji as alleged by the plaintiff, and on the same day the judgment was delivered, and the following findings on the issues were recorded by the learned Judge:—1st.—The suit is not barred so far as concerns moneys paid in Bombay by the plaintiff in respect of *hundis* drawn on the plaintiff by the defendants, but is barred so far as concerns all other sums. 2nd.—This court has jurisdiction so far as concerns moneys paid in Bombay by the plaintiff in respect of *hundis* drawn on the plaintiff by the defendants, but has not jurisdiction so far as concerns all other sums. 3rd.—No finding. 4th.—the account was not adjusted in Bombay by Náran Mulji as alleged by the plaintiff. A decree was accordingly made on the same day referring it to the Commissioner to take an account of those matters in which the Court held it had jurisdiction, and restricting such account to the six years immediately preceding the date of the filing of the plaint, 23rd January 1871. The precise wording of that portion of the decree which directed the account, was as follows:—"This Court doth order that it be referred to C. E. Fox, Commissioner, &c., to take an account of the moneys paid by the plaintiff in Bombay during the period between 24th January 1865, and the date of the institution of this suit, being six years, for the use and at the

(1) 12 Bom. H. C. Rep.

request of the defendants in respect of *hundis* drawn on the plaintiff by the defendants, and the said Commissioner is to allow credit to the said defendants for the sums in that behalf mentioned in the particulars of demand annexed to the plaint, and for all other sums, if any, in respect of which the defendants shall prove themselves entitled to credit wherever (1) the same may have become payable." Liberty was also reserved in the decree to the Commissioner to report specially whether interest should be allowed.

1875.
HIRJI JINA'
N. A. RA
M. L. G.

On 1st April 1874, the plaintiff filed in the Commissioner's office his account, wherein he gave to the defendants credit for two payments, made by the defendants for the plaintiff in respect of two purchases of teak at Dhollera, for which credit had been given to the defendants by the plaintiff in the particulars of his demand annexed to the plaint. To this account the defendants, on 23rd June 1874, filed a surcharge, whereby they claimed credit for Rs. 12,170-3-6 in respect of payments made by the defendants to the plaintiff between 25th January 1865 and 5th July 1865. The plaintiff admitted receipt of the payments mentioned in the defendants' surcharge, but said they were received and ought to be appropriated in satisfaction of his claim against the defendants in respect of moneys due from the defendants prior to 24th January 1865, on which day the plaintiff alleged there was due to him from the defendants a balance of about Rs. 12,000. On 15th September 1874, the Commissioner held that the plaintiff was entitled to make such appropriation of the payments by the defendants, and, as they did not admit the balance claimed by the plaintiff to be due from them on 24th January 1865, ordered the plaintiff to file an account showing how that balance was arrived at. The defendants thereupon obtained from the Commissioner a certificate, dated 2nd October 1874, that such had been his decision, and moved before Bayley, J., for the reversal of that decision. On 19th December 1874 Bayley, J., made an order, directing the Commissioner that the plaintiff was not to be allowed to

(1) This word was written in the decree "whenever," but that appearing on reference to the notes of the learned Judge and of the counsel engaged in the case, as well as to the report of the judgment by a short hand writer, to be a clerical error for "wherever," the Court, at the hearing of the appeal, ordered the error to be rectified.—*Ed.*

1875. appropriate the payments mentioned in the defendants' surcharge
 HIRJI JINA' in satisfaction of moneys due from them prior to 24th January 1865,
 " This was the order now appealed against by the plaintiff.
 NA'KAN
 MULJI.

Inverarity and *Kásináth Thimbak Talang* for the appellant:—
 The real question for the consideration of the Court is the proper construction of the decree of reference of the 20th December 1873.

The defendants do not pretend that at the time of making the payments, they made any specific appropriation of them. They have produced no books, and the fact that all these payments were made between January and July 1865 points clearly to the inference that they were intended by them to be applied in satisfaction of those very debts to which they were actually appropriated by the plaintiff by setting the items in the account against the debits. Nothing was ever said in the Court below in the argument, or in the judgment, or, it is submitted, in the decree of reference, which could have had the effect of preventing the appropriation by the plaintiff of the payments by the defendants in satisfaction of the barred balance, and it was not till the passing of the order now appealed against that we had any idea that Bayley, J., intended his decree of reference to bear such a construction as this order puts upon it. The order now appealed against explains the decree of reference to mean that the whole of the account prior to the six years before the institution of the suit should be wiped out, but that is not what the decree says, and if it had said so, we should immediately have appealed against it. What the decree of reference does say is that, besides those sums for which the plaintiff gives credit to the defendants, they shall be allowed credit for all other sums, "in respect of which they shall prove themselves entitled to credit." But they cannot prove themselves to be now entitled to credit for payments long ago properly appropriated in satisfaction of a previous debt. The payments for which the defendants claim credit by their surcharge were appropriated, at the time they were made, in the plaintiff's books in satisfaction of debts then due by the defendants, that is, credit was given for these payments as against the debits on account of sums due from the defendants to the plaintiff, and at the time of such payments the debts in respect of which they were so appropriated were not barred. Such an appropriation in

account is proper : *Mulchand Gulabchand v. Girdhar Malhar* (1); 1875.
Clayton's case (2). If no appropriation had been made by either HIRJI JINA
 party, the law would have appropriated the payment in satisfaction NA'RAM
 of the first debt. MULJI.

Marriott (*Scoble*, Advocate General, with him) for the respondents.—This Court has nothing to do with the question whether the decree of reference was right or wrong, but has simply to decide whether it will bear the construction put upon it by the order now appealed against. The effect of the finding of the Court below on the first issue was to cut the head off the plaintiff's claim, and that effect was embodied in the decree of reference. There was no prior specific appropriation by the plaintiff of the payments mentioned in the defendants' surcharge, but he is only now seeking to appropriate them to the satisfaction of a barred balance. Those items which the Judge held to be barred ought not to be included in the account. That is what the decree meant, whether right or wrong, and under the decree the Commissioner has no power to take any account other than that for the period specified in the decree. The construction put by a Judge on his own decree ought to be upheld : *Powell v. Powell* (3).

WESTROFF, C.J.—It seems to us that in this case the Commissioner took the right view of the decree, the important part of which is that which directs the taking of the account. (His Lordship, after reading the portion of the decree set out above, proceeded.) We do not perceive upon what principle the account decreed could properly have been limited to six years as it was. However, we are not now re-hearing the cause or reviewing the decree, and, taking it with that limit, we have only to say what is the true construction of that portion of the decree as to credits which I have now read. It is contended on behalf of the defendants that moneys which, assuming the defendants to have been silent at the time of payment as to appropriation, would by law have been appropriated to the satisfaction of the earlier claims of the plaintiff, ought, notwithstanding the general rule of law, under the special language of the decree in this particular case, to be applied in satisfaction of the

(1) 8 Bom. H. C. Rep. 6 A.C.J.

(2) 1 Mer. 572, see p. 608. (3) L. R. 10 Ch. App. 130.

1875. latter items in the account, those namely, which are comprised
HIRJI JINA' within the last six years only of the account. That is, although it
v.
NA'ARAN, is a running account of mutual dealings between the plaintiff and
MULJI. the defendants, the defendants claim to be justified by the terms
of the decree in drawing a line across the account, and saying to the
plaintiff "you are not to go behind that line to show any claim
against us, but we are entitled to bring from behind that line
payments made by us, and apply them in reduction of your claim
on this side." But we are of opinion that, unless the language of
the decree is so explicit as to admit of no doubt whatever on this
point, we should not be justified in putting on the decree a con-
struction so contrary to settled law, and to the justice of the
case. If a hard and fast line is to be drawn across the account,
excluding items of the plaintiff's claim previous to a given date,
the defendant is only entitled to credit for sums paid in respect
of the items of the plaintiff's claim on or subsequently to that
date. It may be that the learned Judge is now of opinion that a
certain construction ought to be put on his decree, yet, if we think
that construction wrong, and the words admit of another, which
we think right, we should not be justified in not putting the latter
construction on them. Looking then at the decree, we are of
opinion that the words "entitled to credit" mean *properly* entitled,
after taking into account all debits. The defendants could not pro-
perly be allowed credit for payments in respect of one set of items
when the law would appropriate those very payments to an entirely
different set of items. That is, payments properly applied by the
law to earlier debits are not (in the absence of an express ap-
propriation by the party making those payments) to be applied
to later debits, and so leave the earlier unsatisfied. The failure
of the plaintiff to prove the alleged adjustment in 1868 does not
in the slightest degree affect the present question. We think in
this case the defendant is, under the decree, only entitled to credit
for such items as he would, by the ordinary custom of merchants in
taking accounts, and by the ordinary rule of law, be entitled to
claim. The order of 19th December 1874 must therefore be
reversed, but there being some vagueness in the decree, and the
learned Judge in the Court below having been with the defendants
on the construction to be put on it, we think the parties
ought to bear their own costs, both of the argument in the

Division Court on the Commissioner's certificate, and of this appeal. The appellant, however, must have his costs of the former argument before us on the question whether an appeal lay from the order now reversed (1).

1875.
HUGH JINA'
NARAYAN
MULLI.

SARGENT, J.—I concur that this order must be reversed. I confess I have felt some difficulty in putting on the decree a construction different to that which the Judge making the decree had himself put on it. On consideration, however, I think the plaintiff may contend that whatever the intention of the learned Judge may have been in making the decree, that intention has not been so clearly expressed as to preclude that construction which can alone do justice between the parties. Under the circumstances, therefore, I think the plaintiff is entitled to insist on the appropriation of these payments in the manner for which he contends.

Order reversed.

[APPELLATE CIVIL JURISDICTION.]

Regular Appeal No. 52 of 1874.

GANPAT PUTAYA' (ORIGINAL PLAINTIFF, APPELLANT) v. THE
COLLECTOR OF KANARA (DEFENDANT, RESPONDENT).

1875.
Oct. 5.

*The Code of Civil Procedure, Section 309—Attachment—Court Fees—Prerogative
of the Crown.*

The Crown has the first claim to the proceeds of a pauper's suit to the extent of the amount of the court fee that would have been payable at the institution of the suit had the plaintiff not been a pauper; and Section 309 of the Code of Civil Procedure does not preclude the Crown or its representative from urging its prerogative.

THIS was a regular appeal from the decision of A. L. Spens, Judge of the District of North Kanara, rejecting the plaintiff's claim.

(1) 12 Bom. H. C. Rep.

1875.

GANPAT
PUTALA'THE COLLEC-
TOR OF KA-
NARA.

The facts of the case, in so far as they are material to the purposes of this report, are as follows :—

The plaintiff, Ganpat, obtained a decree against one Jiváji in the Court of the Subordinate Judge of Kumptá, and, in execution thereof, caused a debt due by one Meghji to Jiváji to be attached by a prohibitory order under Section 236 of the Code of Civil Procedure. This attachment was placed when Jiváji's suit against Meghji, which was brought in *forma pauperis*, was pending. At the conclusion of this pauper suit, in which Meghji was directed to pay Jiváji a sum of Rs. 200, and each party was ordered to pay his own costs, the Collector of the District intervened, and applied to have a sum of Rs. 70-2-2 paid to him, that being the amount which Jiváji would have had to pay as court fee if he had not been allowed to sue as a pauper. The Collector's application having been granted and this sum paid to him, the plaintiff, Ganpat, brought this suit against him to recover that sum, alleging that his attachment was prior to the Collector's, and he had, therefore, the right of prior satisfaction.

The Collector in his written statement answered that the plaintiff's attachment was illegal and of no effect. It was made when the suit was pending, and nothing had been determined in favour of one side or the other.

The District Judge was of opinion that the debt attached by the plaintiff was not a definite one, and that it did not appear to have been beneficial to his judgment-debtor Jiváji. Holding the attachment to be illegal, the Judge rejected the plaintiff's claim.

The appeal was heard by WEST and NA'NA'BHA'I HARIDA's, JJ.

Shámráv Vithal for the appellant.—The plaintiff's attachment being prior, he is entitled to prior satisfaction (Section 270 of the Code of Civil Procedure). Moreover, Section 309 of the Code enacts expressly that the value of court fees is to be recovered in the same manner as costs would be recovered in ordinary cases. No precedence is given to the Crown, which is, therefore, in the same position as any other judgment-creditor. By the issue of the prohibitory order, the plaintiff acquired an interest, which was not affected by any subsequent proceeding.

Dhirajlál Mathurálál, Government Pleader, for the respondent, the Collector.—Before the decision of a pauper suit, it is impossible for the Collector to know from whom he is to recover the institution fees; the earliest time to attach the proceeds of such a suit is immediately after its conclusion. The plaintiff's prohibitory order was a direction to all not to pay until the further order of the Court. The object of Section 236, under which it was issued, is to prevent secret payments. A debt for court fees is a Crown debt, and entitled to precedence. The Legislature did not intend that a Collector should be liable to be defeated in every case by a prohibitory order. In the case of *The Secretary of State in Council of India v. The Bombay Landing and Shipping Company* (1) a Crown debt was held to be entitled to the same precedence in execution as a like judgment in England in the absence of a statutory enactment to the contrary.

1875.
GANDHI
PUTANA
THE COLLECTOR
OF
KANARA.

Shámráv Vithal in reply.

WEST, J., in delivering the judgment of the Court, said:—The decision of this case turns upon the construction of Section 309 of the Code of Civil Procedure. Its direction that the amount of fees, which would have been paid by the pauper plaintiff, shall, on decision of the suit, be recoverable by Government from any party ordered by the decree to pay the same in the same manner as costs of suit are recoverable, does not preclude the Crown or its representative from urging its prerogative and insisting upon its right to precedence. The circumstance of its being placed in the position of judgment-creditor does not reduce its rights of necessity to those of a private judgment-creditor in case of a contest as to prior satisfaction out of moneys realized in execution. It is a universal rule that prerogative and the advantages it affords cannot be taken away except by the consent of the Crown embodied in a Statute. This rule of interpretation is well established, and applies not only to the Statutes passed by the British, but also to the Acts of the Indian Legislature framed with constant reference to the rules recognized in England. And the rule, as applied to the present case, is not an unreasonable one. The Crown has a right to receive certain fees at the institution of every suit; it temporarily foregoes its right in the case of pauper

(1) 5 Bom H. C. Rep. 23 O. C. J.

1875.
GANPAT
PUTAYAT
P.
THE COLLEC-
TOR OF
KANARA.

plaintiffs, and places means in their hands to proceed to judgment against their defendants. It is, therefore, reasonable—supposing always that it is reasonable to levy court fees at all—that the Crown, in consideration of its giving up its right to those fees, should have, for their defrayal, the first claim on the proceeds of the pauper suit. Without the forbearance of the Government to insist on its ordinary rule, the suit, in such a case, could not have been brought or the money realized. As the Government Pleader urged at the bar, if this precedence be not allowed to the Crown, the issue of prohibitory notices under Section 236 of the Code of Civil Procedure, instead of furthering justice, would, in many cases, defeat it by defeating the Government's claim for costs altogether.

This being our opinion on the point, it is unnecessary to discuss the other points raised in argument, and we must confirm the decree of the lower court with costs.

Decree confirmed with costs.

[APPELLATE CRIMINAL JURISDICTION.]

Reference by the Session Judge of Poona under Section 263 of the Code of Criminal Procedure in

1875.
Oct. 12.

REG. v. KHANDERAV BAJIRAV AND SIX OTHERS.

The Code of Criminal Procedure, Section 263—Trial by Jury—Acquittal—Verdict reversed.

The Code of Criminal Procedure, Section 263, casts upon the High Court the duty both of Judge and Jury; but notwithstanding this difference, which clothes it with greater powers and responsibilities than the superior courts in England, it will, as far as may be, be guided by the principle of English law that the verdict of a Jury will not be set aside unless it be perverse and patently wrong, or may have been induced by an error of the Judge. In a proper case, however, the High Court will rectify the verdict of a Jury.

THIS was a reference by W. H. Newnham, the Session Judge of Poona, under Section 263 of the Code of Criminal Procedure.

THIS was one of the numerous Dekhan agrarian riot cases. The accused Khanderav Bajirav and six others were committed by Mr. Macpherson, Magistrate, F. C., in the Poona District, on the

charges under Sections 326 and 457 of the Indian Penal Code. 1875.
 The complainant Vithalrao, who is by profession a money-lender, REF.
 alleged that the accused persons, along with 50 or a 100 persons KHANDRAO
 who were at some distance, broke open the house in which he BAJIRAO.
 was sleeping, demanded immediate surrender of his bonds, attack-
 ed him in various ways with sticks, and lastly, accused No. 2
 caught hold of his nose and accused No. 1 cut it off with an in-
 strument which looked like a knife. He also deposed that
 accused No. 2 took a gold ring off his finger. The Session
 Judge on perusing the evidence of the complainant before the
 committing Magistrate and the other evidence, added the charge
 of dacoity against all the accused before commencing the trial. In
 summing up the facts to the jury the judge explained to them
 that each of the accused present at the attack was equally liable
 with the rest of his fellows in carrying out the common object
 of all. After reading out such portions of the evidence as
 he deemed necessary, he stated to the jury that there were discre-
 pancies with regard to the abstraction of the gold ring, and that
 he did not believe those witnesses who deposed to it. He also
 told them that to constitute the offence of dacoity it must be estab-
 lished that some property was carried off.

The jury found all the accused "not guilty." With this verdict
 the Session Judge disagreed, and he therefore referred the matter
 to the High Court.

The case was heard by WEST and NA'NA'BHA'I HARIDA'S, JJ.

Incurarity (Dhiraajlal Mathuradas, Government Pleader, with
 him) in support of the reference.—The evidence shows beyond
 a doubt that the offences imputed to the accused, including dacoity,
 are proved. The discrepancies about the abstraction of the
 gold ring are unimportant. At any rate there is clear evidence
 that the complainant's documents were violently carried off by
 the accused. Section 263 of the Code of Criminal Procedure gives
 ample powers to the High Court to set aside a jury's verdict in a
 proper case, and this is such a case.

Nagindas Tulsidas, contra.—The Court should not look into the
 case to see whether there is sufficient evidence for the conviction
 of the accused. Such a procedure destroys the finality of a jury's

1875.
GANPAT
PUTAYA
v.
THE COLLEC-
TOR OF
KANARA.

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Nagindás Tulsidás, contra.—The Court should not look into the
 case to see whether there is sufficient evidence for the conviction
 of the accused. Such a procedure destroys the finality of a jury's

1875. verdict. [WEST, J.—We are directed by Section 263 to deal with
 REG. the case as with an appeal. Can you point out any cases in which
 " it was held that we could not examine the evidence?] No: but
 KHANDERA'V even if the Court had such power, the evidence does not warrant
 BA'JIRA'V. the Court's unusual interference. The Judge has himself dis-
 believed some of the witnesses in important particulars, and the
 jury were quite justified in bringing their verdict, which is not
 perverse, and should not, therefore, be set aside.

Inverarity.—In reply.

WEST, J., in delivering the judgment of the Court, said :—The seven prisoners were committed to the Poona Court of Session for trial on the charges of voluntarily causing grievous hurt by means of a cutting instrument (Section 326 of the Indian Penal Code) and of house-breaking by night with intent to commit an offence punishable with imprisonment (Section 457). To this the Session Judge added the charge of dacoity under Section 395. The jury unanimously brought in a verdict of not guilty on all these charges; but the Session Judge, being of a different opinion, referred the case to the High Court under Section 263 of the Code of Criminal Procedure.

The portion of Section 263, under which we have to deal with this case, runs thus :—“The High Court shall deal with the case so submitted as it would deal with an appeal, but it may acquit or convict the accused person on the facts, as well as law, without reference to the particular charges as to which the Court of Session may have disagreed with the verdict, and if it convict him, shall pass such sentence as might have been passed by the Court of Session.” The powers, which this section confers on the High Court and the corresponding duty which it has to perform, differ to some extent from the powers and duties of the Court of Queen's Bench and other superior courts in England in dealing with cases which come before them in the exercise of their high function of reviewing matters disposed of by subordinate courts. It was provided by Magna Charta, as a fundamental constitutional principle, that a free man's liberty or property was not to be interfered with *nisi per legale iudicium parium suorum*. This passage has been variously interpreted, as may be seen by comparing Hallam

with Reeves ; but, in practice, it has long been made a basis for the legal function of the jury, its supremacy in determining questions of fact. In criminal cases "if an improper verdict of not guilty is found in felonies and misdemeanours, the Courts do not set it aside, holding it to be better that the guilty should escape than that the matter should be tried over again:" (Per Alderson, B., in *Hall v. Green* (1);) and even in a penal action it was held in the case just referred to, as in many others, that a wrong verdict is not a ground for a new trial. In ordinary civil cases new trials are granted if the court thinks there has been misconduct on the part of the jury; but in such cases the judges have always to bear the leading principle in mind; when they set aside the verdict of a jury the case has to be submitted for the consideration of a new jury; but every instance of the kind is in some degree an interference with the intended finality of the jury's verdict, and the power is used but very sparingly. Here the law on these subjects is different, and the difference is very important. Trial by jury is a recent institution in India; the judge may differ from the jury as to the facts, and the duty of dealing with a case of that kind is then cast upon the High Court. On a reference by the Session Judge, the whole case is opened up. The section we have quoted lays down that the Court may acquit or convict without reference to the charges made against the accused. In other words, the functions both of the judge and jury are cast upon the Court, and this differentiates our position very widely from that of the Courts in England.

1875.

REG.

v.
KHANDERA'V
BAJIRA'V.

Notwithstanding this difference, however, and the more onerous duties devolving in consequence on the High Courts in India, we still desire to be guided, as far as may be, by the analogies of the English law. It is a well recognized principle that the Courts in England will not set aside the verdict of a jury, unless it be perverse and patently wrong, or may have been induced by an error of the judge. We adhere generally to this principle, notwithstanding our large discretionary powers, first, on the constitutional ground of taking as little as possible out of the hands to which it has been primarily assigned by the legislature, and secondly, because any undue interference may tend to diminish

(1) 23 L. J. N. S. 15 M. C.

1875.
REG
"KHANDERA'V
BA'JIRA'V.

the sense of responsibility which it is desirable that a jury should cherish. We think, however, that by our rectifying a jury's verdict in a proper case, we shall increase, not diminish, that sense of responsibility. Burke, profoundly versed in the principles of the British constitution, said of juries :—" I will make no man, nor any set of men, a complement of the constitution." In this country, we must never let our acquiescence grow into a betrayal of justice. When juries know that their verdicts are liable to the scrutiny and supervision of this Court, they will feel the necessity of exercising conscientious deliberation in arriving at their verdict. The same check will prevent temptations to a wilfully wrong verdict from being held out to them. It is our duty in the present case to satisfy ourselves that the verdict of acquittal is proper, or at least sustainable; and if we find that it is not, the law enjoins on us to set it aside and pass the right judgment ourselves.

If the Session Judge had summed up the facts in the way in which, we think, he ought to have done so, and if the jury had then, in the face of his charge, returned a verdict of acquittal, such a verdict might, we think, have been called a perverse one. According to the charge, we do not think it can be called perverse, but we are of opinion that the Judge took a wrong view in impressing on the jury that the evidence as to the abstraction of the ring from the complainant Vithalráv's finger was not to be believed, and that a charge of dacoity was, therefore, not sustainable. We see no reason to distrust the evidence on that point, the matter having at once been mentioned, and the discrepancies as to it being few and unimportant. By the Judge's expressing his opinion as to the untrustworthiness of a portion of the evidence of three material witnesses, he needlessly, according to our view, put an impediment in the way of the jury, who could not well be blamed for extending their disbelief to the entire testimony of those witnesses. This disbelief would justify their verdict, but that verdict, which would, under ordinary circumstances, have been a perverse one, is none the less a means of defeating justice, because it was induced wholly or in part by a wrong suggestion on the part of the Judge. If a wrong decision has been brought about in any way, we must, on a reference, such as this, endeavour to correct it.

The acquittal, therefore, is not to be set aside the less, because the Judge and the jury have both committed a mistake. Taking this view we reverse the jury's verdict ; and our next duty is to find what precise offence or offences the accused or any of them have committed. We consider it proved that all the accused committed theft of the complainant's bonds, and put him under bodily restraint as a means of doing so. This is sufficient to constitute dacoity, and we find all the accused guilty of it. Nos. 1 and 2, in committing that offence, inflicted grievous hurt by cutting off the complainant's nose. The minimum punishment which can be inflicted for that offence under Section 397 is seven years' rigorous imprisonment. We say rigorous, because it would not be appropriate to a case like this to order simple imprisonment. Looking, however, to the conduct of these two accused and the state of the country, we think it our duty to pass upon each of them a sentence of transportation for ten years. In the case of the others a smaller sentence will suffice. They were present at the infliction of grievous hurt by the first and second accused, and if their object also was to assist in that transaction, they would, under the law, be equally guilty of the graver offence. The circumstances proved in this case do not, however, render it necessary to hold that the common object of the whole assembly was to inflict grievous hurt, or that this was a necessary or any probable consequence of the robbery. We shall, therefore, pass upon each of the accused Nos. 3 to 7 a sentence of two years' rigorous imprisonment.

1875.

REG.

KHANDERA'Y
BA'JIRA'Y.

[APPELLATE CRIMINAL JURISDICTION.]

Appeal by the Government of Bombay.

REG. v. MARUTI D ADA AND OTHERS.

Abetment—Acquittal of principal no bar to conviction of abettor.

The offence of abetment under the Indian Penal Code is a substantive offence. The conviction of an abettor is, therefore, in no way dependent on the conviction of the principal.

1875.
Oct. 12.

THIS was an appeal by the Government of Bombay praying for the reversal of the order of acquittal recorded by N. Daniell,

1875. Session Judge of Poona, in favour of three of the accused persons,
 REG. viz., Náráyan, Sitábái, and Máruti; and the restoration of the con-
 v. victions and sentences passed by W. R. Hamilton, Magistrate, F.C.
 MARUTI
 DA'PA'
 AND OTHERS.

The accused Máruti was charged by Mr. Hamilton with the offences of house-breaking and committing theft in the dwelling house of complainant Govindráv; Constancio, Malhár, Náráyan, and Sitábái were charged with having abetted Máruti in the commission of these offences. All the accused were convicted and sentenced to undergo various terms of imprisonment and pay fines.

In appeal Náráyan, Sitábái, and Máruti having been acquitted by the Sessions Court, the Government appealed to the High Court against the acquittals.

The appeal was heard by WEST and NA'NA'BA'I HARIDA's, JJ.

Dhirajlál Mathurádás, Government Pleader, for the Government, went into the evidence and argued that there was ample evidence for the conviction of the three accused by the Session Judge.

Pándurang Bálibhúdrá, for the accused Náráyan and Sitábái, argued *contra*, and further urged:—If the principal offender, Máruti, be acquitted, his abettors, Náráyan and Sitábái, could not legally be convicted. The most important item of evidence against Máruti consists of the confession of Malhár, but as he was not charged with the same offence, his confession is no evidence against Máruti. The acquittal of Máruti necessarily involves the acquittal of his abettors. See case of *Chaman Bápáji* noted under Section 108 of the Indian Penal Code cited in West's Edition of the Acts and Regulations. The confession of Malhár, even if treated as the evidence of an accomplice, must be corroborated: *Reg. v. Mohesh Biswas and others* (1); though it may be taken into consideration under the Indian Evidence Act I. of 1872, Section 30: *Reg. v. Naga and others* (2); *Reg. v. Chunder Bhutta Charjee* (3).

Dhirajlál Mathurádás in reply:—The principle of these decisions has not been contravened by the Magistrate. The offence of abetment under the Indian Penal Code is a substantive offence.

(1) 19 Calc. W. R. 16 Cr. Rul. (2) 23 Calc. W. R. 24 Cr. Rul.

(3) 24 Calc. W. R. 42 Cr. Rul.

It is not an appendage of the principal offence, and each may be tried independently of the other. All the sections of the code which speak of abetment, especially Section 114, which provides that abettors present at the commission of the offence shall be deemed to have themselves committed the principal offence, and Section 109, which enacts generally that the punishment for both shall be the same, show that the conviction of an abettor should not be made contingent on the conviction of the principal.

1875
RFG.,
v.
MARUTI
DA'DA'
AND OTHERS,

West, J., after commenting on the evidence and expressing the opinion of the court against the acquittal of Náráyan and Sitábái and in favour of that of Máruti, proceeded thus :—

The acquittal of this prisoner (Máruti) makes it necessary to consider a point of law arising from it, and urged by Mr. Pándurang Bálibhádrá for the prisoners Náráyan and Sitábái. He contended that the principal offender having been acquitted, his clients could not be convicted of abetment, and referred us to the case of *Reg. v. Chaman Bápáji*, noted under Section 108 of the Indian Penal Code in West's Edition of the Acts and Regulations. It was there held by Sir Richard Couch, late Chief Justice of this Court, and another Judge, on the 22nd of January 1864, that the principal offender being acquitted, a second prisoner could not, in the same trial, be convicted of abetment of the same offence. This ruling was in accordance with the state of the English law as it existed when an accessory could refuse to plead before the conviction of his principal. It is satisfactory, however, to find that a different state of things prevails now, and that we are not, therefore, bound, even according to the analogies of the English criminal law, to follow the decision cited. Recent English cases, founded on new legislation, have gone the other way. We shall refer to the case of *Reg. v. Hughes* (1). The headnote of that case runs thus :—“An indictment in the first two counts charged the prisoner and *H* jointly with stealing. A third count charged the prisoner alone with receiving the stolen goods. At the trial no evidence was offered against *H*, and he was acquitted, in order that he might be called as a witness against the prisoner. By the evidence it appeared that the prisoner was an accessory before

(1) 6 Jur. 177.

1875. the fact to the stealing by *H*, and that he afterwards received
 REG. the stolen goods. The Jury returned a general verdict of guilty
 v. against the prisoner, which was entered upon all the counts:
 MARUF *Held* that the prisoner was not entitled to an acquittal upon the first
 DA'DA' two counts by reason of the principal, *H*, having been acquitted,
 AND OTHERS. the 11 and 12 Vic., C. 46, Sec. 1, having made the crime of being
 an accessory before the fact a substantive felony." Erle, C. J., in
 delivering judgment in that case, said:—"We consider the con-
 viction may be sustained as a substantive absolute felony. Sup-
 pose the accessory is captured before the principal; under the
 Statute (11 and 12 Vic., C. 46) he may at once be tried and con-
 victed. If afterwards the principal is taken, tried, and acquitted,
 has the accessory a right to be discharged? We are of opinion
 that he has no such right. His sentence may have expired; is
 any wrong done him? We think not. Whether he is tried be-
 fore or at the same time as the principal, he may be guilty as an
 accessory, although the principal be acquitted, it being by no means
 certain that, although acquitted, the principal is not really guilty."
 The offence of abetment under the Indian Penal Code is a sub-
 stantive offence. Its punishment, when the culprit has been
 present at the commission of the principal offence, is the same
 as for that offence; and the trial of it is not, in any way, de-
 pendent, on the conviction of the person charged with the principal
 offence. By the Indian as well as the recent English procedure,
 an abettor may be convicted before the principal is arrested.
 The principal may then be tried and acquitted, but in this case
 the abettor has not suffered any wrong. A rational doubt may
 arise as to the identity or guilt of the principal through the legal
 exclusion as to him of particular portions of the evidence, and
 yet there may be no possible doubt as to the guilt of the abettor,
 in whose case the rules of exclusion do not happen to operate.
 It would be a perversion of the rules of evidence if because the
 operation of a rule is to exclude evidence against a principal, *A*,
 it should operate to the acquittal of an abettor, *B*, who may have
 fully confessed, as Malhár did in this case, and may, without
 doubt, be guilty. The mere circumstance that *B* is tried along
 with *A*, instead of at a different trial, cannot alter the real force
 of the case against him.

Taking the law to be as we have stated it, the acquittal of Máruti—as to which we agree with the Session Judge—does not necessarily involve the acquittal of Constancio and Malhár; nor again does it necessarily involve our upholding the Session Judge's decision with respect to Náráyan and Sitábái.

We direct that the convictions of Náráyan and Sitábái be restored, with the amendment of their extending only to abetment of theft in a dwelling, the prisoners not having been present at the commission of the theft, and also the sentences passed on them respectively by the Magistrate, First Class.

Order accordingly.

[APPELLATE CIVIL JURISDICTION.]

Application for the exercise of the Court's Extraordinary Jurisdiction.

No. 48 of 1875.

UMIA'SHANKAR LAKHMIRA'M (APPLICANT) v. CHHOT'ALA L
VAJERA'M (OPPONENT).

1875
Oct. 12.

Limitation Act (IX. of 1871), Schedule II, Nos. 166, 167.

An Act of Limitation, being restrictive of the ordinary right to take legal proceedings, must, where its language is ambiguous, be construed strictly, *i.e.*, in favour of the right to proceed.

A as purchaser of a decree against *B* applied for execution thereof, and having caused five fields of *B* to be sold in execution, purchased four of them at the court sale, and one from an execution-purchaser. On the 10th July 1871, however, the High Court, in a Miscellaneous Special Appeal by *B* held *A*'s application for execution to have been time-barred, and reversed the orders of the two lower courts. *A* having been put in possession of the fields under the orders of the lower courts, *B*, on a reversal of those orders by the High Court, applied, on the 9th July 1874, to have the fields restored to him together with mesne profits accruing during the time of his dispossession. The first court awarded the fields to *B* with mesne profits but the District Judge, on appeal, held *B*'s application barred under Act IX. of 1871 Schedule II., No. 166 :

Held by the High Court that the exception in No. 166 of the Limitation Act IX. of 1871 is not restricted to any particular species of appeal, that *B*'s application fell within No. 167 and not within No. 166 of the Limitation Act of 1871, and, therefore, was not barred.

THIS was an application for the exercise of the High Court's extraordinary jurisdiction, praying for a reversal of the order of

1875. W. H. Newnham, District Judge of Ahmedabad, made in an
 execution proceeding.
 UMIA'SHAN-
 KAR LAKH-
 MIRAM
 v.
 CHHOTA LAL
 VAJERAM.

The facts of the case and the District Judge's reasons for his decision appear from the following extract from his judgment :—

“ Chhotulal purchased and executed a decree of 1851 against Umiashankar, and bought four fields at the court sale and a fifth from a sale-purchaser.

“ In a Miscellaneous Special Appeal by Umiashankar, the High Court decided on July 10, 1871, that the application for execution had been time-barred, and therefore reversed the lower court's orders.

“ Umiashankar then applied to have the land sold made over to him again, together with mesne profits from date of possession ; and the Subordinate Judge of Kheda awarded them to him, with mesne profits Rs. 265-9-0.

“ The appellant objects that the claim is time-barred, and the sale having been lawful and regular as regards all the fields, and he having been a regular purchaser of one of them at second hand, the order to restore them was wrong ; the claimant should have brought a regular suit to establish his right ; mesne profits could not be claimed in such an application, and had not been awarded by the High Court ; he is a third party, and was not before the High Court in the capacity of a purchaser of the property, and Harilal, from whom he purchased the fifth field, is no party to this proceeding.

“ The first point to be decided is whether the claim was barred by limitation. I think that in the form in which it was made it was so. The order of the High Court was passed on July 10, 1871, and the application by Umiashankar made on July 9, 1874, or just three years after. The order which he obtained from the High Court was made upon a plea of limitation, which would appear to have been raised at the very last moment, and it might have been expected that he would lose no time in having it carried out instead of waiting until three years were nearly over. Act IX. of 1871 was in force when his application was made. The order of the High Court was one not made in a regular suit or appeal

and under Schedule II., Article 166, he should have applied within one year to have it enforced. His Vakil contends, quoting *Gooroo Churn Bose v. Bykuntath Acharjee* (1) and *Nursing v. Bibhadjhaurce* (2), that there was no need for the High Court's order to contain a specific direction that the property should be restored, and that he could claim restoration without bringing a fresh suit, and that his application was not one to enforce the High Court's order. But in *Sheikh Bhoolloo v. Ram Narain Mookerjee* (3) the decision appears to imply that a fresh suit should be brought; and if his application was not one to enforce the order implied in the High Court's decision, I do not see what was. He was, I think, bound either to apply to have such order enforced, or to file a suit against the purchaser of the property. His application, if of the former kind, was made too late under Act IX. of 1871, and it is not a suit but a miscellaneous application. I find, therefore, that, as such, it was barred by limitation, and must be rejected. I do not decide the point whether he has the right to bring a fresh suit against the respondent as purchaser of the property which, the High Court has decided, ought not to have been attached and sold, because the decree was no longer capable of being enforced. The Subordinate Judge's order is reversed. Costs on the respondent.

1875.
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UMIA'SHAN-
KAR LAKH-
MIRA'M
v.
CHHOTALAL
VAJERA'M.

On the 22nd July 1875, the High Court (KEMBALL and LAR-
PENT, JJ.) granted a *rule nisi* on the application of *Dhirajlal Mathuradas* (Government Pleader) on behalf of the judgment-
debtor, Umiashankar Lakhmiram, calling upon the execution-
purchaser, Chhotalal Vajeram, to show cause why the order
of Mr. W. H. Newnam, holding Umiashankar's application barred
should not be set aside.

On the 12th October 1875, *Nagindas Tulsiadas*, on behalf of
Chhotalal, appeared to show cause before WESTROFF, C.J., and
KEMBALL, J., and contended that Umiashankar's application for
the restoration of the fields, dated the 9th July 1874, was govern-
ed by No. 166, Schedule II., Act IX. of 1871, because what that

(1) 5 Calc. W. R. Mis. Ap. 38.

(2) 2 Calc. W. R. Civ. Rul. 275.

(3) Calc. W. R. (1864) Civ. Rul. 129.

1875. application sought to execute was an order of the High Court dated the 10th July 1871, made in a miscellaneous execution matter, and not in a regular suit or in a regular appeal. [WESTROPP, C.J. —The appeal mentioned in No. 166 is not a regular appeal. It may be any appeal. While the word “regular” occurs before “suit” it is omitted before “an appeal”.]

UMIA'SHAN-
KAR LAKH-
MIRA'M
v.
CHHOTA'LAL
VAJERA'M.

WESTROPP, C.J.—The Court is of opinion that the District Judge was in error in holding the present application to fall within Article 166 of Schedule II. of Act IX. of 1871, from which a decree or order on appeal is expressly excepted. That exception is not limited to any particular species of appeal, and this being a Limitation Act, and, as such, restrictive of the ordinary right to take legal proceedings, it must, where its language is ambiguous, be construed strictly, *i.e.*, in favour of the right to proceed (See 9 Bom. H. C. Rep. 111.) This case falls rather within Article 167 of the same schedule, which allows a period of three years for the execution of a decree *or order* of any civil court not provided for by Article 169, which latter is applicable only to judgments, decrees, or orders at the *original jurisdiction side* of courts established by Royal Charters or any order of Her Majesty in Council (see Act VI. of 1874, Sec. 21). The third column to Article 167 shows that decrees or orders made on appeal fall within that Article. This Court reverses the order of the District Judge, and restores that of the Subordinate Judge, but directs that the parties respectively bear their own costs of this appeal, as this Court is of opinion that the appellant has not shown any excuse for his laches in applying for the restoration of his property.

[ORIGINAL CIVIL JURISDICTION.]

*Suit No. 580 of 1872.**Appeal No. 285.*1875.
Oct. 15.MULCHAND JOHA'RIMAL (DEFENDANT) v. SUGANCHAND SHIVDA S
(PLAINTIFF).*Jurisdiction—Letters Patent, 1865, Clause XII.—Cause of Action—Hundi—Consideration—Usage of Shroffs.*

Where a *hundi* had been drawn out of the jurisdiction, upon a person within the jurisdiction, indorsed and delivered, out of the jurisdiction, to one who, out of the jurisdiction, indorsed the same and sent it to a person who, within the jurisdiction, received it, got it accepted, and presented it for payment to the drawee, by whom it was dishonoured within the jurisdiction:

Held that the dishonour of the *hundi* by the drawee within the jurisdiction was a material part of the cause of action by the holder against the first indorser and, consequently, that such material part of the cause of action having arisen within the jurisdiction, and the holder having obtained leave to bring his suit under Clause XII. of the Letters Patent, 1865, the court had jurisdiction to entertain the suit.

The plaintiff, as agent and banker of an Ajmir constituent, received a *hundi* for collection, and, on its acceptance by the drawee, credited the Ajmir constituent with the amount as of the date when the *hundi* would become payable.

Held, that as between the plaintiff and the Ajmir constituent, the plaintiff upon such credit in account being given, became a holder for value.

Held also that, on the *hundi* being dishonoured at due date by the drawee, the plaintiff was justified, by the usage of *shroffs*, in treating the Ajmir constituent as still entitled to credit for the amount, and himself as a holder for value.

Held also that, as between the Ajmir constituent and the first indorser (the defendant and appellant), the giving by the Ajmir constituent to the defendant of another *hundi*, which was never presented in Bombay for acceptance or payment was a consideration for the indorsement by the defendant to the Ajmir constituent of the *hundi* sent by the latter to the plaintiff and sued on by him.

THIS was an appeal argued before WESTROPP, C.J., and SARGENT J., from the decision of Green, J. The facts are fully set forth in the following judgment of the court of first instance (1) delivered on 30th March 1875 by

(1) 12 Bom. H. C. Rep.

1875.
MULCHAND
JOHA'RIMAL
v.
SUGANCHAND
SHIVDA'S.

GREEN, J. :—This is a suit on a *hundi*, dated the 26th April 1871, drawn by Kássidás Vanaráidás at Mandusar on the firm of Bháichand Zumachhrám of Bombay for Rs. 2,500 payable to *Sháh* 45 days after date. The *hundi*, which we will refer to as *Hundi A*, bears on it the following enforcements :—“(This) *hundi* has been sold by Rájrup Hansráj to Bhái Johárimál Gambhírmál (which is the name of the defendant's firm). It was sent from Kotá by Johárimál Gambhírmál to Bhái Johárimál Gambhírmál at Ajmir in order to (the amount) being recovered on my account. (This) *hundi* has been sold by Johárimál Gambhírmál to Bhái Popsangji Hardardás. (This) *hundi* is sent to Bhái Lachhmandás Shivdás (the name of the plaintiff's firm) by Popsang Hardarbaksh from Nasirabad in order to (the amount) being recovered on my account.”

The *hundi*, it appears by the evidence, was received by the plaintiff's firm in Bombay on the 2nd June 1871, and was presented for acceptance on the following day, namely, the 3rd June 1871, to the drawees, the firm of Bháichand Zumachhrám. It was, on such presentment, accepted, according to usage, by the drawees. On the same day, namely, the 3rd June 1871, according to the evidence of Gambhírchand Ranchhordás (now cashier, then a *Gumastá*, in the plaintiff's firm,) an entry was made in the journal of the firm, which entry was transferred to the ledger, and, as appearing in the ledger, is as follows (Exhibit B). The heading of the account is “An account of Bhái Popsang Hardarbhájas, of the cantonment of Nasirabad, being an account relative to transactions effected on behalf of your house,” and the entry, which is a credit one, is as follows :—“Journal, p. 186 The 11th of Asad Vad [13th June] 1 *hundi* [drawn] on Bombay was [received] from Ajmir, payable to your account. It was drawn on Bháichand Zumachhrám on the 6th of Baisuk Sud [26th April] payable after 45 days.” The effect of this was to give credit, as of the 13th June 1871, to the person sending the *hundi*, viz., Popsang Hardarbaksh in his account with the plaintiffs, for the amount of the *hundi*, the entry itself being made on the 3rd June 1871.

According to the evidence, it is the usage of native *shroffs* that where a *hundi* has been accepted, the drawee, on the due date,

sends a man with the money to the person who had presented the bill for acceptance. If the money is not sent on the due date, the holder sends a man to remind the drawee. In the present case, Gambhirchand Ranchhordás (the cashier of the plaintiffs firm) states that as the amount was not received on the due date (viz., the 13th June 1871), he sent a man to demand it, who came back without any money, and he, thereupon, put the matter into the hands of a solicitor. On the next day (the 14th idem) the *hundi* was protested for non-payment by a notary of Bombay, and the notarial certificate, Exhibit C, of such protest has been put in evidence.

1873.
MULCHAND
JOHA'RMAL
SUGANCHAND
SHIVDÁS

According to the evidence of Lálchand Harichand, a *mehdí* of the firm of Bháichand Zumachhrám, the drawees, (speaking from entries in books of the firm made, not by himself, but by another *mehdí*, at present absent from Bombay and at Wadnagar, but which books, the witness was able to state, had been kept in the ordinary course of business), on the 19th June 1871, a *peth* or duplicate of the same *hundi* was presented to the firm of Bháichand Zumachhrám, and was paid on the 22nd June 1871.

Under a commission directed to Ajmir in this suit, certain evidence was taken there, and, according to the evidence of the defendant, called by the plaintiffs as one of their witnesses, the original *hundi*, or *Hundi A*, was sold by the defendant's agent at Ajmir, one Suratrám, and indorsed at Ajmir to Popsang Hardarbaksh, whose name appears on the *hundi* as an indorsee, and who indorsed the *hundi* to the plaintiffs, the consideration for such indorsement by the defendant's agent of *Hundi A*, being another *hundi* (hereafter referred to as *Hundi B*), dated the 25th May 1871, for Rs. 2,500, drawn by Popsang Hardarbaksh at Ajmir on the plaintiff's firm of Lachhmandás Shivdás at Bombay, payable to *Sháh* 51 days after date, that is to say, on the 18th July 1871. Besides *Hundi B*, a certain sum in cash appears to have been paid to the defendant by Popsang Hardarbaksh as the consideration of the indorsement by the defendant of *Hundi A*, and this in respect of interest at 8 annas per cent. on Rs. 2,500, for the period which would elapse between the due date of *Hundi A* (viz., the 13th June,) and that of *Hundi B* (viz., the 18th July).

1875.
 MULCHAND
 JOHA'RIMAL
 v.
 SUGANCHAND
 SHIVDA'S.

The firm of Popsang Hardarbaksh, however, shortly after the drawing of *Hundi* B, stopped payment (the date of such stoppage being stated to have been on the 3rd June 1871), and the defendant, being apprehensive, as he says, that *Hundi* B would not be honoured on presentation, filed a suit in the Court of the Deputy Commissioner at Ajmir, on the 7th June 1871, against Popsang Hardarbaksh, to recover Rs. 2,500 on account of the *Hundi* B. Not, however, content with having filed this suit, the defendant, as he states, four or five days after Popsang Hardarbaksh's failure, procured to be applied for and sent from Mandusar (where *Hundi* A had been drawn) to Bombay a *peth* or duplicate of *Hundi* A, and by means of his agents at Bombay had the same presented to the firm of Bháichand Zumachhrám, and this *peth* was, as before mentioned, paid by the last mentioned firm on the 22nd June 1871.

The defendant in his evidence admits, so also do his witnesses, that no express condition was made between his firm and Popsang Hardarbaksh, that if the *hundi* of the latter (*Hundi* B) was not honoured, or the firm of Popsang Hardarbaksh failed, he (the defendant) was to realise the *hundi* he sold them (*i.e.*, *Hundi* A).

On the 22nd June 1871, a written statement appears to have been filed on behalf of Popsang Hardarbaksh in answer to the suit of the defendant against him in the Ajmir Court, relying on what would appear to be a good enough ground of defence, that as the due date of the *hundi* sued upon had not arrived, the suit was premature. The defendant states further, that having heard from Bombay of the realization of the *peth*, he applied for leave to withdraw his suit, and the order allowing this, but giving leave to institute a fresh suit, on the plaintiff paying the costs, seems to have been made on the 29th June 1871.

I do not find in the evidence any explanation of the reason why the firm of Bháichand Zumachhrám refused payment on the 14th June 1871 of the original *Hundi* A, as at that time the *peth* had not been presented. The practice appears to be for the drawee to pay the original or the *peth*, whichever is first presented for payment, and that the drawees had no intention to dishonour the *hundi* altogether, is shown by their having paid the *peth* a few

days after the original was presented for payment It may reasonably be presumed therefrom that in the period between 3rd June 1871 (when Popsang Hardarbaksh stopped payment) and the 14th June 1871 (when the original *Hundi A* was refused payment) some communication took place at the instance of the defendant with the drawees, in pursuance of which such refusal took place. Whether the anticipation of the defendant that *Hundi B* would not be honoured by the plaintiffs on presentation was well founded or not, it appears from the defendant's evidence that he never sent it to Bombay for acceptance or payment on the plaintiffs as the drawees—at any rate, it never was presented to the plaintiffs in Bombay, and this is an important point with regard to the question whether the consideration for the indorsement to Popsang Hardarbaksh of *Hundi A* can be said to have failed.

1875.
MULCHAND
JOHA'RIMAL
v.
SUGANCHAND
SHIVDA'S.

A good deal of evidence has been given by several of the witnesses, as to the cases in which, according to the usage of *shroffs*, payment of the amount of a *hundi* may be obtained on a *peth* or duplicate. The witnesses all seem to agree in this that when a *hundi* has been lost or stolen, the rightful holder may, according to such usage, obtain from the drawer a *peth* or duplicate, and, on presentation of this to the drawee, has a right to payment of the amount, the original not having already been presented and paid, which, of course, in the case of a *hundi* payable to *Sháh*, may occur. In the present case, however, the defendants, on hearing of the failure of Popsang Hardarbaksh, to whom they had indorsed *Hundi A*, and without any such occurrence as the loss or theft of the *hundi*, procured, as has been mentioned, a *peth*, and, through their agents in Bombay, got the same paid by the drawee, though the original had been already, some days before, presented by the plaintiffs for payment. They set up the case that, according to the usage of *shroffs*, *peths* may also be properly obtained, not only in the cases of loss and theft, but also that when a person to whom a *hundi* has been sold and indorsed has failed, being indebted to the person from whom he had obtained such *hundi*, the latter may obtain a *peth* from the drawer and get payment from the drawee. I do not consider that the evidence clearly establishes such a usage,

1873.
MULCHAND
JOHARRIMAL
"
SUGANCHAND
SHIVDA'S.

which would, it appears to me, have a very serious effect in respect to the negotiability of *hundis*. A subsequent *bond fide* indorsee might find, on presentation of the original *hundi*, that, by reason of the insolvency of some preceding indorsee, and of the state of the accounts between such indorsee and his indorser—facts of which he might be wholly ignorant—a *peth* had been obtained and paid by the drawee. I do not, however, consider it necessary to decide on the existence or validity of such an alleged usage. The evidence seems rather to have been given by way of meeting any observations, which might have been made on the defendant's conduct in procuring the *peth* and getting it paid than by way of affording an answer to this suit. Had the suit been against the drawees, the question of the payment of a *peth* might have been very material, but I do not see that it is in the present case, which is a suit by holder against former indorser.

The first issue raised is, whether this Court has jurisdiction to entertain this suit. A suit for the same matter was filed in this Court by the present plaintiffs against the present defendant in 1871, without having obtained the leave of the Court under Clause XII. of the Letters Patent. On the hearing before myself in July 1872, the suit was dismissed for want of jurisdiction. I think the suit was then rightly dismissed. When the present suit was instituted in November 1872, the leave of the Court to institute the suit was first obtained, and the question is not, as in July 1872, whether the cause of action arose, but whether any part of it arose, within the jurisdiction of this Court. It is contended when a *hundi* has been drawn out of Bombay upon a person in Bombay, indorsed and delivered out of Bombay to one who, out of Bombay, indorses the same and sends it to a person who, in Bombay, receives it, gets it accepted, and presents it for payment to the drawee, by whom it is dishonoured, that no part of the cause of action by the Bombay holder against the first indorser has arisen within the jurisdiction.

A certain number of cases were cited in the course of the hearing, being decisions chiefly of English Courts, as to the meaning of the words "cause of action." In three classes of cases, chiefly in England, has the meaning of these words been considered. (1)

In cases of applications to change the venue of a transitory action to another county on an affidavit that the plaintiff's cause of action arose in the county of B, and not in the county of A (where the action was brought), or elsewhere out of the said county of B (2) With reference to the words of the Act establishing County Courts in England (9 and 10 Vic., Ch. 95, Section 128,) giving an election to proceed in the superior courts, where (among other cases) "the cause of action did not arise wholly or in some material point within the jurisdiction of the court where the defendant dwells or carries on his business at the time of the action brought." And (3) with reference to the provision of Sections 18 and 19 of the Common Law Procedure Act, 1852 (15 and 16 Vic., Ch. 76.) regulating the mode of proceeding in the superior courts against defendants, whether British subjects or not, residing out of the jurisdiction of such Courts, when a satisfactory affidavit has been made "that there is a cause of action which arose within the jurisdiction or in respect of a contract made within the jurisdiction," and when certain other formal steps have been taken.

1875.

 MULCHAND
 JOHA'RIMAL
 v.
 SUGANBHAI
 SHIVDA'S.

Then we have of cases arising in India a certain number reported, where a judicial interpretation or application has been given, viz. (1) to the words, in Bengal Regulation II. of 1808, Sections 3 and 4, "where the cause of action shall have arisen," or to the words, in Section 5 of Act VIII. of 1859 "if the cause of action shall have arisen," and (2) to the words, in Clause XII. of the High Court Charters of 1865, "if the cause of action shall have arisen either wholly, or, in case the leave of the court shall have been first obtained, in part within the local limits of the ordinary original civil jurisdiction," &c.

Of the first class of the English cases, of which a great many are to be found, it will be sufficient to remark generally that they all treat a cause of action as something divisible and consisting of parts having possibly a local origin in different places. I shall content myself with referring to three of them: *Olissold v. Olissold* (1 Term. Rep. 647), which was an action for libel, and the libel having been written in Berkshire and directed into Surrey, and the venue being laid in London, an application to

1875.
 MULCHAND
 JOHARIMAL
 v.
 SUGANCHAND
 SHIVDA'S.

change the venue to Berkshire was refused, because the defendant could not truly make the usual affidavit that the cause of action arose wholly in Berkshire and not elsewhere. *Cailland v. Champion* (7 Term. Rep. 205), an action on a policy of life insurance, where it was held that the whole cause of action could not have arisen in London, as the person, whose life was insured, had died in Scotland; and *Butler v. Fox* (18 L. J. C. P. 304) an action on a policy of marine insurance made in London, the breach alleged being non-payment of the value of the goods insured. An application to change the venue to London was refused, as it could not be truly said that the whole cause of action arose in London, the goods, the subject of the policy, having been lost on a foreign voyage by perils of the sea.

The second class of English authorities, those, namely, on the jurisdiction of the local county courts, it is not necessary to enumerate, as they are all, or almost all, to be found cited and commented upon in the judgments of Sir Adam Bittleston or of Mr. Justice Holloway in the case of *DeSouza v. Coles* (3 Mad. H. C. Rep. 384). I cannot understand why these cases should not be treated as authorities, so far as applicable, on the interpretation of the language of Clause XII. of the Letters Patent. The High Courts are not courts of ordinary original civil jurisdiction over the whole territories of the presidencies to which they belong. Though, in some respects, their original civil jurisdiction is wider than that of the District Courts, yet it is limited, and there is no presumption in favour of jurisdiction beyond what is to be found expressly conferred by the Charters of constitution. And the County Courts Act and Letters Patent agree in this that they both expressly treat a cause of action as consisting of parts which may have different localities.

The third class of English cases, those, namely, which have reference to Sections 18 and 19 of the Common Law Procedure Act, 1852, are *Sichel v. Borch* (2 H. & C. 954; 38 L. J. Ex. 179); *Allhusen v. Margarejo* (L. R. 3 Q. B. 340); *Jackson v. Spittal* (L. R. 5 C. P. 542); *Durham v. Spence* (L. R. 6 Ex. 46); *Cherry v. Thompson* (L. R. 7 Q. B. 573), and *Vaughan v. Weldon* (L. R. 10 C. P. 47). The first mentioned case (which was in the Exche-

quer) was a suit by indorsee against drawer and indorser of a bill of exchange. The defendant was a merchant residing in Norway, where he drew the bill on an English house, and made it payable in London. He indorsed it in Norway, and sent it by post to a firm in England, who indorsed it to the plaintiff. It was held that the cause of action did not arise within the jurisdiction, on the ground that the contract was not wholly made in England, Martin, B., one of the members of the Court, expressly stating that the cause of action included the drawing and indorsement on the bill of the name of the drawer, both of which took place in Norway. This case of *Sichel v. Borch*, in its circumstances, has great similarity to the present one, viz., a bill drawn or indorsed, out of the jurisdiction, by one not subject personally to it, on a person within the jurisdiction, and there dishonoured. Both in the argument and judgment it seems to have been assumed that *part* of the cause of action arose within the jurisdiction, the question being considered to be, did the *whole* of it so arise? In the second case (which was in the Queen's Bench), it was held where a contract was made out of the jurisdiction, to be performed within the jurisdiction that the breach within the jurisdiction did not constitute a cause of action arising within the jurisdiction. In the third case, however (which was in the Common Pleas), it was held, in the case of a contract made out of the jurisdiction not to do a certain thing, which contract was broken by doing that thing within the jurisdiction, that a cause of action did arise within the jurisdiction. In the fourth case (which was in the Exchequer again), it was held (Chief Baron Kelly, however, dissenting) that in the case of a contract made out of the jurisdiction but broken within the jurisdiction, a cause of action *did* arise within the jurisdiction, thus following *Jackson v. Spittal*. In the fifth case (which was of the Queen's Bench), the case of *Jackson v. Spittal* was dissented from and *Sichel v. Borch* and *Allhusen v. Malgarejo* expressly adhered to, by holding that in the case of a contract made in Germany, but broken in England, no cause of action arose within the jurisdiction. The decision, however, went also on another ground, viz., that the breach also took place in Germany. It will be seen, therefore, that, so far as concerns the words in question occurring in the Common Law

1875.

MULCHAND
JOHA'RIMAL
v.
SUGANGHAND
SHIVDA'S.

1875.
 MULCHAND
 JOHA'RIMAL
 v
 SUGANCHAND
 SHIVDA'S.

Procedure Act, 1852, there had been a conflict of decisions between Courts in England of co-ordinate jurisdiction, and that the law on the point must be said to have been in an uncertain state. A diversity, it is further to be observed, seems to exist among the Judges who took part in the foregoing decisions, not only in respect to the interpretation to be put upon the words of the section taken in conjunction with other words connected with them, but also in the legal definition to be given in general of the phrase "cause of action." The point again arose in the last mentioned case, viz, *Vaughan v. Weldon*, and the Judges of all the three courts appear to have conferred together, and a majority having expressed themselves in favour of following the decision in *Jackson v. Spittal*, the Judges of the Queen's Bench, though retaining their opinion, for the sake of conformity agreed to be bound by the opinion of the majority. Though uniformity of practice on this point was thus secured, the divergence of opinion as to the elements of a cause of action has still remained. It is to be borne in mind also that the provisions of the Common Law Procedure Act, which have given rise to this diversity of decision, concern matters of procedure and not jurisdiction, that is to say, they furnish a less cumbrous and simpler means of exercising a jurisdiction the Courts already had, and are not, as the provisions in the English County Court Act and the Letters Patent of the High Court, directed to the marking out and limiting of the jurisdiction of a Court. For this reason it seems to me that the English decisions on the County Court Act are more in point with regard to the interpretation of the Letters Patent than those on the matter of venue or of the Common Law Procedure Act, 1852.

Of the first class of Indian cases, those, namely, relating to the effect to be given to the words "if" or "when the cause of action shall have arisen," the case of *Luckmichund v. Zaranurmull* (8 Moore I. A. 291), is of course as an authority, and, so far as it goes, of the highest importance. Mr. Justice Holloway, in his judgment in *DeSouza v. Coles* (3 Mad. H. C. Rep. 413), lays it down that this decision "involves implicitly the following propositions:—(1) The making of the contract is a matter perfectly indifferent and is no part of the cause of action. (2) The place at

which an obligation is to be performed is its seat, and the place of jurisdiction. That place of expected performance may be determined by the circumstances of the case, and in a contract of partnership, its main seat is the place at which each of the partners is bound to pay what may be due." With all respect for the opinion of Mr. Justice Holloway, it does not appear to me that the case, when considered, *does* involve the propositions mentioned, or, at any rate, the first of them. The suit was brought in the Zillah Court at Agra to recover Rs. 10,75,156-1-0, being the alleged share, with interest, of the defendants of the loss, viz., Rs. 22,67,962, incurred in respect of certain opium speculations which had been carried on on the joint account of the plaintiffs and defendants. The plaintiffs had firms at Muthra (within the jurisdiction of the Agra Court) and at Rutlam (which was without it), and the defendants carried on business at Rutlam. An agreement was made between the two firms in contemplation of making opium speculations on joint account, and, in considering the effect of the judgment, it is to be taken as a fact to be assumed that this agreement was concluded, in respect of place, at Rutlam. So far as the terms of the agreement appear in the report, no place can be said to have been fixed for the performance of it. The agreement provides for the opening of a separate set of books for the joint transactions of the parties, fixes their shares, and provides that the business was to be conducted by one Saligram, and the only reference to place is in these words: "In these transactions your (*i.e.*, the plaintiffs') capital at Muthra shall be embarked." Larger transactions in opium were thereupon entered into in various places, the seat of the partnership being at Muthra, where the moneys were supplied by the plaintiffs, where the partnership books were opened and kept, and to which place the account sales of opium sold elsewhere and the proceeds themselves of such sales were sent. It appears further that at Muthra also the co-partnership dealings and accounts were closed and a balance struck against the co-partnership amounting to the aforesaid sum of Rs. 22,67,962, and it was to recover the sum of Rs. 10,75,156-1-0, being the defendants' share of such loss, that the suit was brought. The Judicial Committee held that the cause of action arose at Muthra. There is

1875.

MULCHAND
JOHA'RIMAL
v.
SUGANCHAND
SHIVDAS.

1875.
MULCHAND
JOHARRIMAL
v.
SEGANCHAND
SHINDA'S.

certainly nothing in the course of the judgment which can be said to involve this, that in the particular case the original contract of partnership formed any part of the cause of action at all. The decision, however, in my opinion, by no means involves the sweeping proposition stated by Mr. Justice Holloway, "that the making of the contract is a matter perfectly indifferent, and is no part of the cause of action" in any case. The decision may rather, it seems to me, be treated as one involving this, that in such circumstances as there existed, the contract of partnership, on the footing of which transactions were engaged in, was not a part of the cause of action, and that not being a part of the cause of action, the Court considered the place, where it was made, to be a matter perfectly indifferent. The suit was not one for a breach of any term of the partnership contract, but rather as appears what in English pleading would be called an action on an account stated, the statement of such account having taken place within the jurisdiction of the court where the suit was brought. The only other form the suit can have assumed would be for a partnership account, and where else could the cause of such action be said to arise, except where by consent of the parties, the head-quarters of the partnership had been established, the moneys advanced, the accounts kept, and the final accounts of the partnership dealings closed? The language of the judgment is, to say the least, consistent with the existence of the opinion, on the part of the Judicial Committee, that the making of the contract not being a part of the cause of action, the fact that it was made out of the jurisdiction was immaterial, and did not preclude the court from entertaining the suit which was either on an account stated within the jurisdiction in respect of partnership transactions the head-quarters of which were within the jurisdiction, or for an account of such partnership transactions.

The cases in which, in the courts of British India, the question as to the meaning of the words "cause of action" in the Letters Patent has arisen, are, besides *DeSouza v. Coles*, the following: *Hanmandas v. Bhagwandás* (7 Beng. L. R. 102 and 535) and *Mohdormoham. Beg. v. Jadomoney Dossee* (10 Beng. L. R.

In these two cases, the leave of the court had not been previously obtained to the institution of the suit, but I think, from what appears in the reports, that both Mr. Justice Phear and Mr. Justice McPherson would have held, in a case like the present, that a part of the cause of action had arisen in Bombay, and that if leave had been first obtained to institute the suit, the court would have had jurisdiction. In the case of *Huth v. Long* (19 L. J. Q. B. 325), however, in an action on a bill of exchange by the indorsee against drawer, the fact that notice of dishonour was given to the defendant within the jurisdiction of a particular County Court, where also the defendant resided, was held sufficient, under the County Court Act, to deprive the plaintiff of his costs, the suit having been brought in a superior court. The decision involved this that notice of dishonour was a part, and a material part, of the cause of action against the drawer of a dishonoured bill of exchange, and that such notice having been given within the jurisdiction of a certain County Court, where the defendant resided, the cause of action in some material point arose within such jurisdiction. In the present case, the dishonour of the bill itself by the drawee took place in Bombay, and was, I think, beyond all doubt, a part, and a material part, of the cause of action against a prior indorser, and this being so, and the leave of the court to institute the suit having been obtained, I am of opinion that this court has jurisdiction to entertain this suit.

1875.

MULCHAND
JOHARIMAL
v.
SUGANGHAND
SHIVDA'S.

With regard to the other questions in the case, it appears from the evidence that the plaintiffs (who are a considerable firm of shroffs and bankers in Bombay and other places) had, for some time, acted as bankers and agents of a firm of Popsang Hardarbaksh who carried on business at Ajmir and elsewhere, but not in Bombay. The course of the ordinary business was that the firm of Popsang Hardarbaksh, if they had *hundis* drawn on Bombay, used to send them down to the plaintiffs for collection, and used themselves to draw *hundis* on the plaintiffs' firm in Bombay against any funds of theirs in the plaintiffs' hands, or, if there were no such funds, the plaintiffs used to honour such *hundis* on the credit of their correspondent. In the present case, it appears that, on receipt by the plaintiffs of *Hundi A.* and on its

1875.

MULCHAND
JOHARRMALSUGANOHAND
SHIVDA'S.

in their account with the plaintiffs' firm for the amount as of the date when the *hundi* would become payable, the drawees being at the same time debited. At the time when such credit was given and after allowing such credit, the balance against Popsang in account with the plaintiffs was Rs. 13,221-8-0. That such credit in account is a consideration in the case of an indorsee of a bill of exchange is illustrated by the case of *Percival v. Frampton* (2 Cr M. and R. 180), and the plaintiffs, though agents of Popsang in receiving the *hundi* for collection, became, upon such credit being given, holders for value. The evidence of the practice followed by *shroffs* when a *hundi* has been sent down to Bombay for collection and when payment is refused, the amount having been already credited to the sender, is that in general the *hundi* is returned to the sender, a debit entry against him being at the same time made. In the present case, however, on the refusal by the drawee to pay the *hundi*, no debit entry was made to the sender Popsang, but the amount remained credited to him, the cashier of the plaintiffs' firm in Bombay stating, as the reason for not so debiting the sender, that they wished to sue the defendant. The plaintiffs' conduct in treating Popsang as entitled to credit for this *hundi*, though dishonoured by the drawee, has been consistent, as it appears, from the evidence taken at Ajmir, that in the suit filed some months after at Ajmir by the plaintiffs against Popsang to recover the balance due to them, they still allowed credit for the amount of this *hundi*. Having regard to the evidence of usage, I am of opinion that the plaintiffs were entitled to take the course they did in treating Popsang as still entitled to credit for the *hundi*, though dishonoured by the drawee, and in treating themselves as holders of the same for value. With regard to the question of consideration given by Popsang to defendants for *Hundi A*, the *Hundi B* was of course in itself a consideration besides the payment of a sum in cash on the difference in interest. The *Hundi B* was, as has been seen, never presented in Bombay for acceptance or payment, and was, therefore, never dishonoured. How, then, can it be said that there has been any failure of consideration for the indorsement to Popsang of *Hundi A*? There is no ground for any certain conclusion

have been) for acceptance by the plaintiffs before Popsang's failure was known in Bombay, would not have been accepted by the plaintiffs, and as the defendant had given consideration for it, he might have sued the plaintiffs upon it, if accepted by them, and recovered the amount. I am of opinion, therefore, that there was consideration for *Hundi A* both as between Popsang and the defendant and as between Popsang and the plaintiffs, and that of the former consideration no failure has been shown. On the 2nd, 3rd, and 4th issues, therefore, the finding is that, besides the *hundi* in para. 3 of the written statement mentioned, there was payment of a sum of cash, the amount of which does not appear, in respect of interest on Rs. 2,500 for the period between the due dates of that *hundi* and the *hundi* sued upon in this suit. That further the plaintiffs received the *hundi* sued upon as agents of Popsang Hardarbaksh, but that before and at the time of the same becoming payable and at the time of the institution of this suit, they became and were holders of the same for value, and so far did not hold the same as agents only of the said Popsang. This being so, the finding on the 5th issue is that the plaintiffs are entitled to recover the moneys claimed in the plaint. Decree for the plaintiffs for Rs. 2,500 with simple interest at 9 per cent. per annum from the 15th June 1871 till this day, and Rs. 10 for notarial charges; costs. Interest on decree at 6 per cent.

1875.

MULCHAND
JOHA'IMAL
v.
SUGANCHAND
SHIVDA'S.

Pigot and Inverarity for the appellant.—The first question is whether this Court has jurisdiction to entertain the suit. Leave has been obtained by the plaintiffs to institute this suit under Clause 12 of the Letters Patent, on the ground that a part of the cause of action arose within the jurisdiction of this Court, but it is admitted that the only part of the so-called cause of action that arose within this jurisdiction was the dishonour of the *hundi*. Dishonour alone within the jurisdiction is not such a part of the cause of action as to entitle the plaintiff to sue an indorser without the jurisdiction, for the indorser does not contract to pay the money in the place on which the bill is drawn, but in default of payment there, after due notice, to reimburse the holder at the place where the indorsement was made. Story, Conflict of Laws, Section 315. The cause of action against the

1875. in their account with the plaintiffs' firm for the amount as of the date when the *hundī* would become payable, the drawees being at the same time debited. At the time when such credit was given and after allowing such credit, the balance against Popsang in account with the plaintiffs was Rs. 13,221-8-0. That such credit in account is a consideration in the case of an indorsee of a bill of exchange is illustrated by the case of *Percival v. Frumpton* (2 Cr. M. and R. 180), and the plaintiffs, though agents of Popsang in receiving the *hundī* for collection, became, upon such credit being given, holders for value. The evidence of the practice followed by *shroffs* when a *hundī* has been sent down to Bombay for collection and when payment is refused, the amount having been already credited to the sender, is that in general the *hundī* is returned to the sender, a debit entry against him being at the same time made. In the present case, however, on the refusal by the drawee to pay the *hundī*, no debit entry was made to the sender Popsang, but the amount remained credited to him, the cashier of the plaintiffs' firm in Bombay stating, as the reason for not so debiting the sender, that they wished to sue the defendant. The plaintiffs' conduct in treating Popsang as entitled to credit for this *hundī*, though dishonoured by the drawee, has been consistent, as it appears, from the evidence taken at Ajmir, that in the suit filed some months after at Ajmir by the plaintiffs against Popsang to recover the balance due to them, they still allowed credit for the amount of this *hundī*. Having regard to the evidence of usage, I am of opinion that the plaintiffs were entitled to take the course they did in treating Popsang as still entitled to credit for the *hundī*, though dishonoured by the drawees, and in treating themselves as holders of the same for value. With regard to the question of consideration given by Popsang to defendants for *Hundī A*, the *Hundī B* was of course in itself a consideration besides the payment of a sum in cash or the difference in interest. The *Hundī B* was, as has been seen, never presented in Bombay for acceptance or payment, and was, therefore, never dishonoured. How, then, can it be said that there has been any failure of consideration for the indorsement to Popsang of *Hundī A*? There is no ground for any certain conclusion or presumption that *Hundī B*, if at once presented (as it might

have been) for acceptance by the plaintiffs before Popsang's failure was known in Bombay, would not have been accepted by the plaintiffs, and as the defendant had given consideration for it, he might have sued the plaintiffs upon it, if accepted by them, and recovered the amount. I am of opinion, therefore, that there was consideration for *Hundi A* both as between Popsang and the defendant and as between Popsang and the plaintiffs, and that of the former consideration no failure has been shown. On the 2nd, 3rd, and 4th issues, therefore, the finding is that, besides the *hundi* in para. 3 of the written statement mentioned, there was payment of a sum of cash, the amount of which does not appear, in respect of interest on Rs. 2,500 for the period between the due dates of that *hundi* and the *hundi* sued upon in this suit. That further the plaintiffs received the *hundi* sued upon as agents of Popsang Hardarbakhsh, but that before and at the time of the same becoming payable and at the time of the institution of this suit, they became and were holders of the same for value, and so far did not hold the same as agents only of the said Popsang. This being so, the finding on the 5th issue is that the plaintiffs are entitled to recover the moneys claimed in the plaint. Decree for the plaintiffs for Rs. 2,500 with simple interest at 9 per cent. per annum from the 15th June 1871 till this day, and Rs. 10 for notarial charges; costs. Interest on decree at 6 per cent.

1875.

MULCHAND
JOHA'RIMAL
v.
SUGANLAL
SHIV DAS.

Pigot and Inverarity for the appellant.—The first question is whether this Court has jurisdiction to entertain the suit. Leave has been obtained by the plaintiffs to institute this suit under Clause 12 of the Letters Patent, on the ground that a part of the cause of action arose within the jurisdiction of this Court, but it is admitted that the only part of the so-called cause of action that arose within this jurisdiction was the dishonour of the *hundi*. Dishonour alone within the jurisdiction is not such a part of the cause of action as to entitle the plaintiff to sue an indorser without the jurisdiction, for the indorser does not contract to pay the money in the place on which the bill is drawn, but in default of payment there, after due notice, to reimburse the holder at the place where the indorsement was made. Story, *Conflict of Laws*, Section 315. The cause of action against the

1875. indorser is his contract, or indorsement, and his breach of the contract, or failure to pay after notice of the dishonour. In this case the indorser's contract and its breach both took place at Ajmir. The dishonour in Bombay was only a collateral circumstance which threw on the indorser his liability to perform his contract at Ajmir. The cause of action is not to include everything which it is necessary for the plaintiff to establish, but only the contract and the breach: *Allhusen v. Malyarejo* (1).

MULCHAND
JOTHA'NIMAL
".
SUGANCHAND
SHIVDA'S.

[SARGENT, J.—Is not the dishonour in itself the cause of action, being the very gist of the plaintiff's claim?]

It is submitted not in an action against the indorser. The indorser's contract in this case, made at Ajmir, was to pay at Ajmir and on breach, at Ajmir, of that contract, he became liable at Ajmir. The dishonour in Bombay was no breach of the indorser's contract, but only an event in the absence of which the indorser's liability would not arise. Even after the dishonour at Bombay the indorser might have paid at Ajmir, in which case there would have been no cause of action against him at all. The cases relating to jurisdiction decided by the English Courts on the construction of the Common Law Procedure Act do not properly apply to the present case, because in them the question was whether or not the English Courts should refuse to extend their jurisdiction, whereas here the question is whether the Court will seek to extend its jurisdiction. The remarks of Bittleston, J., in *DeSouza v. Coles* (2) are an authority for the proposition that in a suit against an indorser the cause of action arises where his contract is made, and not elsewhere, and Holloway, J., in the same case (p. 413) distinctly holds that the place where an obligation is to be performed (Ajmir in the present instance) is the place of jurisdiction over it. In *Hernaman v. Smith* (3) Parke, B., in the course of the argument, remarked (4):—"Everything which the plaintiff was bound to do, in order to recover the reward, was done by him within the jurisdiction of the County Court; but the event depended on a contingency, over which he had no control; there-

(1) L. R. 3 Q. B. 340.

(2) 3 Mad. H. C. Rep. 384, see p. 397.

(3) 10 Exch. 659.

(4) *Id. ib.* 661.

fore, does not the case resemble that of a promise, founded on good consideration, to pay a sum of money if J.S. shall go to Rome? In such case would not the County Court of that district where the contract was made have jurisdiction, inasmuch as the contract was performed so far as depended on the parties themselves?" It is true that subsequently in his judgment the learned Baron retreated from this position. But it is submitted that the principle enunciated in that remark is the one which ought to govern this case, otherwise, if the judgment in the case last cited is to be followed here, this Court will assume to itself jurisdiction over the whole world if only a single circumstance on which the plaintiff bases his claim arises in Bombay. That is to say, the indorser of a bill of exchange in America might be sued in this Court if one of many subsequent indorsements were made in Bombay. In the case of *Potter v. Brown* (1) which arose on the dishonour in England of a bill drawn and delivered in America, the effect of the dishonour in England is discussed, and the implied promise to pay was held to have arisen in America.

1875.
MULGHAND
JOHA'RIMAL
v.
SUGANCHAND
SHIVDA'S.

[SARGENT, J.—That cannot be denied, but the implied promise to pay rests on the dishonour in England.]

[WESTROPP, C.J.—The Court did not hold that the dishonour was no part of the cause of action, which is your contention now.]

But it is very nearly to be inferred from Lord Ellenborough's words, "the bill was drawn in America upon a person in England, but not having been accepted, the parties stood on their original rights, upon a contract made in America, for which a security was there agreed to be taken, upon the faith indeed that it would be accepted and paid in England; but of which there has been no performance: no English act has been done to alter the situation of the parties, even the notice of the non-performance must have been given in America" (2). The English Courts have been in conflict as to the meaning of the words "cause of action," but *Jackson v. Spittell* (3) is the case now to be followed in the English Courts: *Vaughan v. Weldon* (4).

(1) 5 East, 124.

(2) *Id. ib.* 130.

(3) L. R. 5 C. P. 542.

(4) L. R. 10 C. P. 47.

1875.
MULRASHI
JOHAKIMMAL
SUGANRASHI
SHIVDA &

For the Court to assume jurisdiction in this case would be to put into the hands of the plaintiff a dangerous power, which he might employ to the inconvenience of defendants at a great distance, and it is easy to imagine instances in which this inconvenience would be so great that the exercise of such a power by the plaintiff would amount to a positive injustice. It is true that it is in the discretion of the Judge to whom the plaint is brought for acceptance to grant or refuse leave to proceed under the 12th clause of the Letters Patent, but it is very improbable that he would refuse leave, unless it appeared on the face of the plaint that leave ought not to be granted, and in most cases it would be no difficult matter so to frame the plaint, for instance, on the common money counts, that that fact should not be apparent. To put such a power into the hands of the plaintiff would amount to an injustice, because the drawer or indorser of a *hundi* at Ajmir cannot prevent it being indorsed to a holder in Bombay, but the converse of this objection cannot apply in behalf of the holder in Bombay, because he need not purchase a *hundi* with the names of foreign indorsers on it: *Bouthwick v. Walton* (1).

The second point for consideration is whether the plaintiff is entitled to sue as holder of the *hundi*. Our contention is that he is not a holder at all, but merely an agent for collection as shown by the terms of the indorsement. Even if the evidence is sufficient to establish the usage found by the Court below, which we deny, we say that in this particular instance the effect of the indorsement is to constitute the plaintiff only an agent for collection, and therefore he is not entitled to treat himself as a holder for value: *Clitty on Bills*, 10th Edn, p. 271; *Story on Bills*, section 209; *Delors v. Harriot* (2); *Bank of Utah v. Smith* (3); *Cassill v. Doves* (4). *Perrin v. Frampton* (5) was relied on by the learned Judge in the Court below, but that case is distinguished from this, because there in the inception of the transaction credit was given by the banker to the sender of the bill on the faith of the bill, and that is the principle of all the cases on the point: *Story on Bills*, section 192.

(1) 15 C. B. O. S. 501.

(2) 1 Shower 163.

(3) 18 Johnstone 230, cited in *Story on Bills*.

(4) *Blackford* 385, cited in *Story on Bills*.

(5) 2 Cr. M. and R. 180.

[SARGENT, J—Suppose the case of a bill sent by a customer to his banker for collection without any express directions. If the customer is indebted to the banker, the latter may treat himself as a holder for value. In this case the sender merely states on the hundi that he sends it for collection.]

1875.
MULCHAND
JOHA'RIMAL
v.
SUGANCHAND
SHIVDA'S.

The test is whether the credit is given on the faith of the bill at the time of receiving it, whether the bill was taken either as payment or security for a pre-existing liability. In the present instance the indorsement is conclusive evidence that the plaintiff held the *hundi* only in the character of agent for collection, and as such could not have indorsed it to any one else: *Sigourney v. Lloyd* (1). The credit to Popsang in the plaintiff's books is not a genuine transaction but a mere practice of book-keeping, and cannot become a genuine credit till the *hundi* is paid. Popsang is credited on the due date of the *hundi*, not because the plaintiff is content to receive the note as payment or security for Popsang's balance due to him, but because he expected on the due date to get the money. Popsang was insolvent on the date of the credit. If the plaintiff is to be treated as a banker, he has no right to sue in the present action: Story on Agency, p. 228, note 3; *Treuttel v. Barandon* (2); *Sigourney v. Lloyd* (3); *Lopez v. Maddan Thakoor* (4). Byles on Bills of Exchange, p. 157, 10th Edn.

Latham and Furrar for the respondent.—No stronger arguments can be adduced on behalf of the respondents than those which are contained in the well-considered judgment of the court below. As to the argument of the appellant on the question of jurisdiction, in the first place it is opposed to what has long been considered the policy of the Court, viz, to extend its jurisdiction, in the second place it is submitted that this Court will put on the words "cause of action" the same construction that has been put on them by the Courts in England, and it is assisted in so doing by the words of the Charter, which in expressly mentioning "a part of the cause of action" clearly contemplates the divisibility of a cause of action into all its essential and material parts, the existence of any one of which within the jurisdiction of this Court entitles the plain-

(1) 8 R. and Cr. 622.

(2) 8 Taunt 100.

(3) 8 R. and Cr. 622.

(4) 5 Beng. L. R. 521, see p. 525.

1875
MUL HAN
JOHA'RIMAL
v.
SUGANCHAND
SHIVDA'S.

tiff to sue here, and dishonour is such a part of the cause of action, because it is a material circumstance without which the plaintiff could not sue the indorser; moreover, if notice of dishonour is a material part of the cause of action, *a fortiori* must the dishonour itself be so: in the third place, with regard to the argument *ab inconvenienti*, it must be borne in mind that not only is the power of the Court to grant leave to sue under clause 12 of the Letters Patent a discretionary one, which a Judge will refuse to exercise if the defendant show sufficient cause for his so doing, but the discretion is appealable: *Hadjee Ismail Hadjee Habbob v. Hadjee Mahomed Hadjee Joonab* (1). Next as to the question whether the plaintiff is a holder for consideration and entitled to sue, Popsang might have maintained this suit against the defendant, nor could the latter have pleaded a set off, as he has never presented the other *hundi*, and the defendant having indorsed this *hundi* to Popsang for value cannot have any equity against Popsang, nor can the defendant say that it is any hardship on him that this *hundi* has got into our hands. The plaintiff is a holder for value. According to the general custom of Bombay credit is given to the customer when the *hundi* is received. The plaintiff is banker to Popsang, whose pre-existing debt is a good consideration: Byles on Bills of Exchange, 9th Edn., p. 121; *Perriol v. Frampton* (2); *Bosquet v. Dudman* (3); *Atwood v. Crowdie* (4); *Bolland v. Bygrave* (5), *Giles v. Perkins* (6). The cases cited on behalf of the appellant show that in cases of restricted indorsement the person with whom the bill is negotiated takes with notice of the equity attaching.

Pigot in reply.—The cases cited show that the bills received were received and given credit for simultaneously, but in this case the *hundi* was held from 3rd to 13th June by the plaintiff as a mere agent, the property remaining in Popsang. How then can the plaintiff turn himself into a holder for value? Exact justice would be done by leaving the parties in their present position. The plaintiff is not a party to the instrument, or if he is, he takes

(1) 13 Beng. L. R. 91,
(2) 2 Cr. M. and R. 180.
(3) 1 Stark 1.

(4) *Id.* 483.
(5) 1 Ry. and M. 271.
(6) 9 East, 12.

it liable to the equity to which it is subject. According to the English doctrine the judgment appealed against is correct, but it is the doctrine of this country that ought to be applied to the case, and, according to that, no consideration has been given for the *hundi* but the difference of interest only.

1875.
MULCHAND
JOHA'RIMAL
v.
SUGANCHAND
SHIVDA.

WESTROP, C.J.—The facts of this case are very clearly stated in the judgment of the Court below by GREEN, J., and we agree with him in his decision on those facts. We must consider that several matters combine to make up a cause of action, and that, in such a case as the present, the dishonour of a bill or *hundi* by the drawee is a part of the cause of action of the holder against the indorser. It has been held that notice of dishonour is a material part of the cause of action against an indorser, and that being so it seems to us to follow as a matter of course that the dishonour itself must also be a material part of the cause of action.

We also consider that the custom sworn to by the plaintiff's witnesses is a reasonable one, and in accordance with the law merchant. We must regard the plaintiff as holder for value of the *hundi* sued on. It appears that there was a large balance due to him from Popsang and on receipt of the *hundi*, viz., on the 3rd June, he entered the amount to the credit of Popsang, and subsequently left this entry undisturbed. The evidence shows that he was by the custom warranted in so doing, and we consider that custom a good one.

With regard to the contention of the appellant that the effect of the indorsement on the *hundi* was to render the plaintiff an agent only for collection, we are of opinion that the indorsement is no more restrictive than if it had been the direction usually given by English merchants "do the best for me."

As to consideration, we think that had Popsang been the plaintiff, the defendant could not have resisted his claim. The consideration for *Hundi A* was *Hundi B*. Now the latter *hundi* was never presented, but that was the defendant's own affair, and he must take the consequences. He may have thought that the plaintiff would not pay it, or he may have thought that there was

1875. a balance in favour of Popsang ; but, however that may have been,
 MULCHAND the defendant did not present *Hundi B*, and there seems to have
 JOHA RIMAL
 v.
 SUGANCHANI been no excuse for his not doing so.

SIVDA S.
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The decree of the court below must be affirmed with costs.

SARGENT, J.—Concurred

[APPELLATE CIVIL JURISDICTION.]

*Special Appeal No. 134 of 1875.*1875.
Oct. 14.NARAYAN UNDIR PATIL (DEFENDANT) v. MOTILAL RAMDA'S
(PLAINTIFF).*Bond—Error in account—Waiver—Disputed—Indorsement—Receipt—
Evidence of payment.*

Where the defendant executed to the plaintiff a bond for the payment of the balance found to be due from the defendant to the plaintiff upon an adjustment of the account of their mutual dealings, which bond contained the following stipulation: "I shall pay the money after causing the payment to be entered on the back of this bond or after taking a receipt for the same I shall not lay any claim to my payment made except in this way".

Held that, though the defendant at the time of the adjustment disputed the correctness of the account, yet that by having executed the bond and made payments under it, he must be held to have waived his objection, and in a suit on the bond could not be permitted to re-open the question of the correctness of the balance, though he might possibly have been allowed to do so had he alleged that he had discovered errors in the account after the execution of the bond, and had he specified some of the alleged errors.

Held also that the stipulation in the bond could not be permitted to control Courts of justice as to the evidence which, keeping within the rules of the general law of evidence in this country, they may admit of payments; and the Anglo-Indian law of evidence not excluding oral evidence of payments, it would be against good conscience and the policy of the law to reject it, though the absence of indorsements is a circumstance of some importance, which ought not to be overlooked, but is by no means conclusive.

Bekara Tatah v. Varuntum Channa (Mad. S. D. A. Rep. for 1855, pp 49 and 50) impeached; *Sashachellum Chetty v. Govindappa* (5 Mad. H. C. Rep. 451), *Kashinath Balal Oka v. Narra Jun* (Bom. Sp. Ap. 438 of 1872), and *Nugur Mull v. Ascemoolah* (1 N.-W P. H. C. Rep. 146), approved.

THIS was a special appeal, heard on 14th October 1875 by WESTROPP, C.J., and KEMBALL, J., from the decision of H. J. Parsons, Assistant Judge at Tanna, amending the decree of the Subordinate Judge at Wásin.

The plaintiff sued the defendant on a bond passed by the latter to the former to recover the amount found to be due from the defendant to the plaintiff upon an adjustment of the accounts of their mutual dealings. The bond contained the following stipulation: "I shall pay the money after causing the payment to be entered on the back of this bond, or after taking a receipt for the

1875.
 NA'RAIAN
 UNDER PA'TIL
 v.
 MOHILAL
 RAMDA'S.

same. I shall not lay any claim to any payment made except in this way." The defendant admitted the execution of the bond, and having made certain payments under it, but said the balance secured by the bond was incorrect, owing to errors in the account, and that at the time of the adjustment and ever since he had disputed the accuracy of the balance. He further alleged that he had made various payments in respect of the balance which were not indorsed on the bond, and for which he had no receipts. The Assistant Judge held that the defendant could not be allowed to re-open the question of the correctness of the balance, and that oral evidence to prove the payments alleged by the defendant was not admissible.

Mahábir Chimanáji Apte for the special appellant.—The plaintiff's accounts were required both to prove errors in the balance for which the bond was passed, and subsequent payments made in satisfaction of it, as appears clearly from the *Dakháat* (Exhibit No. 16). The defendant contended from the beginning that the balance was incorrect. The Assistant Judge wrongly held the stipulation in the bond that payments were to be evidenced by an indorsement on the back of it or by receipt, to be a bar to receiving oral evidence to prove payments which are not evidenced by indorsement or receipt.

[KEMBALL, J., referred to *Sashachellum Chetty v. Govindappa* (1).]

Shántarám Náráyan for the special respondent.

Pándurang Balibhadra, as *amicus curiæ*, mentioned.—*Káshináth Balál Oka v. Nárájá Ján and others* (Special Appeal No. 438 of 1872) decided by NA'NA'BHAI HARIDA'S and LARREY, JJ., on 25th June 1874.

WESTROFF, C.J. :—The Assistant Judge, in speaking of alleged payments by the defendant for which he claims credit, says :—
 "Where an instalment bond contained a stipulation that payment of the instalments should be indorsed upon it, and that in the event of litigation, any allegation of other modes of settlement should be discredited, the Sadr Adálat rejected a written release, filed by the defendant, because it was not indorsed on the bond (S. A. No. 2 of 1855 ; Colebrooke's Digest Bk. I., pl. 285, 286). So here, too, I shall discredit the oral evidence of these witnesses as to

payments having been made in satisfaction of this bond, and only believe the evidence of the receipt. I think it the only proper course to pursue. The lower Court found the payments proved, not on the evidence of the witnesses, but because the plaintiff did not produce his account books, but the account books were asked for, not on this point, but on the point as to whether, when the bond No. 3 was executed, Rs. 999 were due or not. The non-production of them has no connection with this part of the case."

1875.

NA'RA'YAN
UNDIR PA'TIL
"MOTILAL
RA'MDA'S.

This Court feels bound to observe that somewhat more of accuracy as to the facts would have been desirable on the part of the Assistant Judge. The plaintiff's accounts were asked for as well for the purpose of showing payments to him subsequently to the date of the bond (1st January 1870, Mārgshirsh 30th, Samvat 1926), as for the purpose of impeaching the correctness of the balance of account due at the end of A.D. 1869, for which the bond was given. The books asked for are from Samvat 1921 to Samvat 1928 (see Exhibit No. 16). Those subsequent to Mārgshirsh 30, Samvat 1926 (1st January 1870), could only have been asked for with reference to the alleged payments in respect of the bond. And in Exhibit No. 15 it is distinctly apparent that the books were sought for that purpose as well as for the other.

We so far agree with the Assistant Judge that we do not think that the defendant ought to be permitted to re-open the question of the correctness of the balance for which the bond of the 1st January 1870 was given. The defendant says that he objected to it at that time, and he produced a witness who also testified to that effect.

Assuming that to be true, the defendant must be regarded as having waived his objection, for, notwithstanding it, he subsequently executed the bond and made payments upon it.

It would be different if his allegation were that after the execution of the bond he discovered the errors in the account on which the balance was arrived at. In such a case, it might possibly, on specification of some one or more of the alleged errors, be right to allow him to re-open the question of the correctness of the account, but that is not his case.

The next point to be disposed of is, whether the Judge was right in holding that the oral evidence of payments alleged to

1875.
NARAYAN
UNDER PATTIL
v.
MOTILAL
RAMDAS.

have been made by the defendant could not be taken into consideration. The learned Assistant Judge, in the above extract, referred to a decision of the Sadr Adalat in such a manner as to lead this Court to suppose that he meant the Sadr Adalat of this Presidency, and has caused much trouble and loss of time in searching for that decision. It appears, however, to be the Madras Sadr Adalat, which, in *Bhanna Tattiah v. Vasuntam Chinnai* (1), without giving any reason for their ruling, decided that, where an instalment bond contained a condition that the payments should be indorsed on the bond, and that, in event of litigation, any allegation of other modes of payment should be discredited, a receipt in writing by the obligee of the bond could not be received as evidence of a payment by the obligor. This Court, even if that decision were still intact, would decline to follow it, inasmuch as the giving of a receipt in writing by the obligee not indorsed upon the bond would amount on his part to a waiver of, and dispensation with, the condition. Further, this Court regards such a stipulation as in itself so objectionable that it ought not to be enforced.

It is against good conscience that an obligee should stipulate that, although he may have been paid in part or in full, he should, if the evidence of such payment were not in writing, be at liberty to treat the payment as a nullity. He would, in enforcing such a condition, be availing himself of his own negligence or wrong. Such a condition, we think, could only be imposed by the Legislature, which has, in certain cases, imposed somewhat analogous conditions, as for instance in Section 206 of the Civil Procedure Code, which provides that "no adjustment of a decree in part or in whole shall be recognized by the Court, unless such adjustment be made through the Court or be certified to the Court by the person in whose favour the decree has been made, or to whom it has been transferred."

The stipulation in the bond is, "I shall pay the money after causing the payment to be entered on the back of this bond, or after taking a receipt for the same. I shall not lay any claim to any payment made except in this way." The stipulation is stronger and clearer than that in *Sashuchellam v. Gorindappa*

(1) Mad. S. D. A. Rep. for 1853, pp. 49 and 50.

(1) in which the High Court of Madras must be regarded as having over-ruled the decision of their predecessors of the Sadr Adalat in *Bekana Tutiah v. Vasuntim Chinnu*, but the reason, which we have already given, is, we think, quite sufficient to support the conclusion at which we have arrived, viz., that the stipulation in the bond cannot be permitted to control Courts of Justice as to the evidence which, keeping within the rules of the general law of evidence in this country, they may admit of payments. There is nothing in that law, which would warrant our Courts in excluding direct oral evidence of payment. We agree with Scotland, C.J., and Innes, J., (2) that the absence of indorsements in the case of a bond containing (as bonds here often do) such a stipulation as that here, is a circumstance of some importance and ought not to be overlooked, but it is by no means conclusive and ought not to be so regarded. The passages in Colobrooke's Dig. Bk. I., pl. CCLXXXV, CCLXXXVI., referred to by the Assistant Judge, show the antiquity of the practice amongst Hindus of indorsing payments on bonds and of giving receipts in writing. Those texts, however, as regards the debtor are hortatory rather than mandatory, while the two following texts (CCLXXXVII., CCLXXXVIII.), show that the Hindu law with respect to the creditor, who accepted a payment, but gave no receipt or refused to give it, was stringent even to the extent of treating such an omission or refusal as a forfeiture of the balance of the debt. It is, however, with the Anglo-Indian law of evidence we have to deal. It does not exclude oral evidence of payment, and we should deem it to be both against good conscience and the policy of the law to reject it. Its value must be weighed in each particular case.

1875.
 NA'RA'YAN
 UNDER PA TAL
 v.
 MOTILAL
 RA'MDA'S.

This cause must be retried by the Assistant Judge. Our previous observations show that the plaintiff's account books, subsequent to 1st January 1870, should be called for. If he refuses to produce them or does not satisfactorily account for their non-production, the Assistant Judge should take that circumstance into consideration together with such evidence, oral or otherwise, as there may be of the payments alleged by the defendant and not admitted by the plaintiff. We reverse the decree of the

(1) 5 Mad. IL. C. Rep. 451.

(2) *Id.*, *ib.* 453.

1875.
 NA'RA'YAN
 UNDER PATEL
 v.
 MOTILAL
 RAMDAS.

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(1) Mad. S. D. A. Rep. for 1855, pp. 49 and 50.

(1) in which the High Court of Madras must be regarded as having over-ruled the decision of their predecessors of the Sadr Adalat in *Bekana Tatiah v. Vasuntum Chinnu*, but the reason, which we have already given, is, we think, quite sufficient to support the conclusion at which we have arrived, viz., that the stipulation in the bond cannot be permitted to control Courts of Justice as to the evidence which, keeping within the rules of the general law of evidence in this country, they may admit of payments. There is nothing in that law, which would warrant our Courts in excluding direct oral evidence of payment. We agree with Scotland, C.J., and Innes, J., (2) that the absence of indorsements in the case of a bond containing (as bonds here often do) such a stipulation as that here, is a circumstance of some importance and ought not to be overlooked, but it is by no means conclusive and ought not to be so regarded. The passages in Colebrooke's Dig. Bk. I., pl. CCLXXXV., CCLXXXVI., referred to by the Assistant Judge, show the antiquity of the practice amongst Hindus of indorsing payments on bonds and of giving receipts in writing. Those texts, however, as regards the debtor are hortatory rather than mandatory, while the two following texts (CCLXXXVII., CCLXXXVIII.), show that the Hindu law with respect to the creditor, who accepted a payment, but gave no receipt or refused to give it, was stringent even to the extent of treating such an omission or refusal as a forfeiture of the balance of the debt. It is, however, with the Anglo-Indian law of evidence we have to deal. It does not exclude oral evidence of payment, and we should deem it to be both against good conscience and the policy of the law to reject it. Its value must be weighed in each particular case.

1875.
NARAYAN
UNDIR PATIL
MOTILAL
RAMDAS.

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(1) 5 Mad. II. C. Rep. 451. (2) *Id. Ib.* 453.

1875. Assistant Judge and remand this cause for retrial on the merits; costs of both appeals and of the suit to be disposed of by him as may appear to him to be just.

NA'RA'YAN
UNDIA PA'UL
v.
MOHILA'L
RA'MDA'S.

We understand that Nánábhái Haridás and Larpent, J.J., have, in Special Appeal 138 of 1872 (decided 25th June 1874), *Káshinath Balal Oka v. Narra Jan and others*, come to a decision as to the admissibility of oral evidence notwithstanding such a condition as in the bond in this suit. *Nagar Mull v. Acmoolak* (1), is to the same effect.

[APPELLATE CRIMINAL JURISDICTION.]

1875.
Nov. 18.

REG. v. LAKHYA' GOVIND AND ANOTHER.

The Code of Criminal Procedure, Act X. of 1872, Section 67—Jurisdiction—Dacoity in the Gayakwád's territory—Trial in British Territory.

Where dacoity was committed at Velanpor, a village in the territory of H. H. the Gayakwád, and a part of the stolen property found where it had been concealed by the accused in British territory, it was

Held that a conviction of dacoity could not be sustained, that being a substantive offence completed as soon as perpetrated at Velanpor, although, had Velanpor been in British territory, the subsequent acts in the process of taking away the property might in the legal sense have coalesced with the first and principal one, so as to give jurisdiction under Section 67 of the Code of Criminal Procedure in each district into which the property was conveyed. But on a conviction of retaining stolen property the sentences awarded could, it was held, be sustained, the retaining having taken place in British Territory.

THIS was an appeal from the decision of H. F. Aston, Assistant Session Judge of Surat, confirmed by H. Birdwood, Session Judge.

The evidence showed that the appellants formed part of a gang which committed dacoity at Velanpor in the territory of H. H. the Gayakwád. A portion of the stolen property was found concealed at the village of Sáriá, in the Chikli Taluka of the Surat District. This circumstance, the Assistant Judge supposed, gave his court jurisdiction to try the accused on the charge of dacoity, though it was committed in foreign territory. The trial accordingly went on, and the evidence having been found sufficient, resulted in the conviction on that charge of both the accused who were sentenced

(1) 1 N. W. P. H. C. Rep. 146 (1869, Part VIII.)

to rigorous imprisonment for seven and five years, respectively. These sentences were duly confirmed by the Session Judge as required by law.

1875.
REG.
2,
LAKHYA'
GOVIND.

An appeal having been admitted by the High Court, it was heard by WEST and NA'NA'BHA'I HARIDA's, JJ.

There was no appearance either on behalf of the accused or of the Crown.

PER CURIAM :—We do not think the conviction of dacoity can be sustained. That was a substantive offence completed as soon as perpetrated at Velanpor, although, had Velanpor been in British territory, the subsequent acts in the process of taking away the property might, in the legal sense, as they would have the same legal character, have coalesced with the first and principal one so as to give jurisdiction under Section 67 of the Code of Criminal Procedure. But we think the conviction may be altered to one of retaining stolen property known to have been obtained by dacoity (Indian Penal Code, Section 412), and the sentences upheld. The retaining is included in the more comprehensive charge viewed as an abstract accusation of an act attended with a certain intent or consciousness, and the conception of dacoity being independent of the place where it was committed suffices to cover what is embraced within it, though the latter was an act done in British territory. The retaining was in British territory; its legal character depended on circumstances the definition of which does not involve a territorial term, though on a question of the liability of any particular person under a combination of them the question of place would for jurisdictional purposes be an essential one.

We accordingly alter the conviction in the case of each prisoner to one under Section 412 of the Indian Penal Code without disturbing the sentences.

Order accordingly.

[ORIGINAL CIVIL JURISDICTION.]

1875.
Nov. 27.

Referred from the Court of Small Causes.

Suit No. 15222 of 1874.

PRATAP DAIJI (PLAINTIFF) v. THE BOMBAY, BARODA, AND
CENTRAL INDIA RAILWAY COMPANY (DEFENDANTS).

*Act XVIII. of 1854, Section 17—Act XXV. of 1871, Section 2—Railway
Company—Ticket—Trespass.*

The plaintiff entered a carriage on the defendants' railway at Surat with the purpose of proceeding to Bombay. By an oversight, and without any fraudulent intent, he omitted to procure a ticket at Surat. On arriving at Nowadri, he applied to the station master for a ticket to Bombay, but was refused; he was however allowed by the defendants' servants to proceed in the same train to Balsar, where he again applied for a ticket and was again refused, but was directed by the defendants' servants to get into the train and not leave it again. At Dhāndu he again got out and applied for a ticket to the station master. During a discussion between the plaintiff's master and the station master, the plaintiff, at the direction of his master, re-entered the train. Ultimately the station master refused to give the plaintiff a ticket, and ordered him to get out of the train; and on his not complying with this order, sent a sepoy, who forcibly removed the plaintiff from the carriage. In an action by the plaintiff to recover damages for the forcible and illegal removal of the plaintiff from the carriage, and for the illegal detention of the plaintiff at the station at Dhāndu, and for the illegal refusal of the defendants to allow the plaintiff to proceed in the train to Bombay :

Held, 1st, that the latter portion of Section 2 of Act XXV. of 1871, amending Section 1 of Act XVIII. of 1854, which provides for payments to be made by persons failing to produce their tickets when demanded by the servants of the Company, applies only to the case of a person who has received a ticket, and will not or cannot produce it, and not to a person travelling without having obtained a ticket with no intention to defraud ;

2nd.—That the absence of a fraudulent intention did not make the entry into the carriage less unlawful, and consequently that the plaintiff started from Surat as a trespasser ;

3rd.—That the conduct of the railway officials at the stations intermediate between Surat and Dhāndu, if it amounted at all to leave and license to the plaintiff to proceed without a ticket, could only operate as such until the train stopped at the next station ;

4th.—That there was no legal obligation on the station master to issue a ticket to the plaintiff to enable him to proceed from Dhāndu.

THIS was a case * referred from the Court of Small Causes at Bombay for the opinion of the High Court under Section 35 of

Act IX. of 1850. It appeared from the evidence that the detention complained of by the plaintiff was not forcible. After he had been ejected from the carriage in which he was sitting, he was told that there would not be another train for Bombay for 24 hours, and on enquiring where he was to pass the interval, was told he might remain in the station. The other facts of the case are fully stated in the judgment.

1875.
PRATA'U
DA'JI
v.
BOMBAY.
BARODA, AND
CENTRAL
INDIA
RAILWAY.

At the hearing of the reference before WESTROPP, C. J., and SARGENT, J.,

Farran, for the defendants in support of the rule for a new trial.—The plaintiff not having a ticket was a trespasser, and as such liable to be removed: Act XVIII. of 1854, Section 17. There was no waiver of the trespass on the part of the defendants, as the guard and porters who at Nowsári and again at Balsár suffered the plaintiff to proceed, were acting beyond the scope of their authority in so doing. At any rate, the plaintiff became a trespasser at Dhándu in refusing to leave the train when ordered to do so by the station master. The latter was not bound to receive the fare tendered to him by the plaintiff after the arrival of the train at Dhándu.

Marriott, for the plaintiff.—The defendants were bound to convey the plaintiff, and therefore he was no trespasser even at Surat; still less can he be held to be a trespasser after Nowsári, whence he proceeded with the express leave and license of the defendants. The plaintiff's obligation to take a ticket is imposed on him by Section 2 of Act XXV. of 1871, amending Section 1 of Act XVIII. of 1854. This section must be read as a whole, and so reading it the defendants might be justified in exacting the penalty therein prescribed for the violation of its provisions, but not in treating the plaintiff as a trespasser. Section 3 of Act XVIII. of 1854 provides only for the case of a passenger travelling without a ticket with intent to evade the payment of his fare, and it is clear that there was no such intent here. The tender of the fare at Dhándu imposed on the defendants the common law obligation of carriers to carry the plaintiff.

Farran, in reply.—The leave and license, if any, was determinable at the will of the defendants, and they determined it at Dhándu. The latter portion of Section 2 of Act XXV. of 1871,

1875.
PRYVALE
DATT
BOMBAY,
RAPODA, AND
CENTRAL
INDIA
RAILWAY.

amending Section I of Act XVIII. of 1854, applies only to the case of a passenger who has taken a ticket but fails to give it up when required. It would be unreasonable to expect the defendants to issue tickets and accept the tender of a fare whenever and wherever required to do so.

Cur. ad. vult.

The judgment of the Court was delivered on November 27th 1875 by

SARGENT, J.—This matter comes before us on a case stated for the opinion of the High Court under Section 35 of Act IX. of 1850, and arising out of an action brought by the plaintiff, in the Small Causes Court, to recover from the defendants the sum of Rs. 200 as damages for the forcible and illegal removal of the plaintiff from one of the defendants' carriages at Dhándu station, and for illegal detention at the aforesaid station, and for illegal refusal of the defendants to allow the plaintiff to proceed in the train to Bombay. At the hearing of the cause, the Fourth Judge of the Court was of opinion that the defendants had committed the several illegal acts with which they were charged, and passed judgment for the plaintiff for the full amount of his claim and costs. A rule *nisi* was obtained by the defendants for a new trial, and came on for argument before the First and Fourth Judges of the Court, who were divided in their opinion,—the First Judge being of opinion that there had been no illegal removal of the plaintiff from the carriage, nor illegal detention; and that, even supposing (which the learned Judge did not admit) that the defendants' servant was bound to give the plaintiff a ticket on tender of the fare at Dhándu, still that as the plaintiff did not say he had suffered any damage from the defendants' refusal to give him a ticket, the plaintiff's claim of Rs. 200 could not be supported, and that, therefore, the rule should be made absolute. The Fourth Judge, on the other hand, adhered to the opinion he had expressed at the hearing, and held that the rule *nisi* should be discharged. The facts, so far as they are material, are stated in the case as follows:—"On the 30th June 1874, the plaintiff, who is a sepoy in the service of Tyrrell Leith,

Esq., Barrister-at-Law, was with his master at Surat, and his master being about to proceed by the defendants' railway to Bombay, the plaintiff, in attendance on his master, got into the train at Surat, his master being in another carriage in the same train; and the plaintiff and his master started by the train for Bombay. When the plaintiff got into the train at Surat, he had no ticket, nor had any been taken by him or on his behalf by his master or any other person. The omission by the plaintiff to procure a ticket arose from a mere mistake or misunderstanding, and there was not on the part of the plaintiff or his master at any time any intention of evading the payment of his fare or of travelling without a ticket. In fact the plaintiff supposed that his master had a ticket for him, while his master was under the belief that the plaintiff had his own ticket. At Nowsári station the plaintiff, for the first time, ascertained that his master had no ticket for him. His master immediately provided him with money to buy one, and the plaintiff applied to the station master at Nowsári for a ticket to Bombay, but was refused, on what grounds it does not distinctly appear, but he was permitted by the defendants' servants to proceed in the train without a ticket. When the train arrived at Balsár, the plaintiff again applied for a ticket, but again failed to get one, and the guard of the train put him into the carriage and warned him not to get out again, as the train stopped a very short time at the stations south of Balsár. On arrival at Dhándu the plaintiff again got out, and applied to the station master there for a ticket, and explained to the station master how he happened to be without one. An explanation of the matter was also offered by the plaintiff's master to the station master, who, however, refused to give the plaintiff a ticket. While at Dhándu, and while a discussion was going on between the plaintiff's master and the station master about the case, the plaintiff's master ordered the plaintiff to get into his carriage and remain there while he (Mr. Leith) would arrange matters with the station master. There is no doubt, and we find as a fact, that the plaintiff was all along ready and willing to pay for his ticket, and that at Dhándu, Mr. Leith, on behalf of the plaintiff, offered to pay any sum that might be demanded by the station master, provided the plaintiff was given a ticket. The station master,

1875.

PRALAB
DAJI
v.
BOMBAY,
BARODA, AND
CENTRAL
INDIA
RAILWAY.

1875.
 PRATA'B
 DA'JI
 v.
 BOMBAY,
 BARODA, AND
 CENTRAL
 INDIA
 RAILWAY.

however, refused to give him one, and finding that the plaintiff had gone into the train again, ordered him out, and, on the plaintiff not coming out of the carriage, sent a sepoy who forcibly removed the plaintiff from the carriage. The plaintiff, being unable to obtain a ticket from the defendants' servants at Dhánu and not being allowed to enter the train without one, was left behind at Dhánu, and was practically unable to go to Bombay before the departure of the next train for Bombay, which involved a detention of 21 hours. Before the arrival of the next train, he purchased a ticket and proceeded in that train to Bombay." In this state of facts, the important question for determination is whether the plaintiff was in the train at Dhánu station under circumstances which constituted him a trespasser. If the Company were entitled to regard him as such, then, whether under the express provision of Section 17 of Act XVIII. of 1851, or in exercise of the right which the law accords to every proprietor to remove a trespasser, using only such force as may be necessary for the purpose, the defendants were, we cannot doubt, justified in removing the plaintiff from the train. It was contended, however, for the plaintiff that, although Section 2 of Act XXV. of 1871 makes it unlawful for a passenger to enter a carriage without having first paid his fare and obtained a ticket, still that such prohibition must be read in connection with the rest of the section; and that as it expressly provides that in case the traveller does not produce his ticket, he is to pay the fare or increased fare, the Company might enforce that provision, but could not treat the plaintiff as a trespasser. This argument, assuming that the section is to be read as a whole, derives some support from the remarks of Coleridge, J., at the conclusion of the judgment in the *Great Northern Railway Company v. Harrison* (1), but it is not necessary for us to express an opinion on the point, as we think that the latter part of the section applies only to the case of a person who has received a ticket, and will not or cannot produce it, and not to a person, as in this case, travelling without having paid for and obtained a ticket, with no intention to defraud. Such was the construction placed on identically the same words embodied in a bye-law of the Lancashire and York-

(1) 23 L. J. Exch. 308, see p. 310.

shire Railway Company in the case of *Diarden v. Townsend* (1): "It seems to me," says Cockburn, C.J. (2), "that the bye-law relates to the case of a person having a ticket, but failing to conform to the regulations of the company by producing it;" and Lush, J., says—(3): "The bye-law seems only to be pointed at what is to be done with the ticket with which the passenger is required to provide himself and at the consequence of not producing and delivering it up as required." Lastly, it was urged that there was no fraudulent intention. Now, a fraudulent intention is doubtless by Section 3 of Act XVIII. of 1854 made an essential condition of travelling on a railway without payment of the fare being dealt with as an offence; but the absence of such intention does not make the entry into the carriage less unlawful, or of itself afford any ground for depriving the Company of the right of putting an end to such unlawful occupation. Having started, therefore, from Surat under circumstances which, we think, entitled the Company to treat the plaintiff as a trespasser, the question arises whether anything subsequently occurred which changed the character of his occupation of the carriage. It appears that at Nowsári station, having for the first time ascertained that his master had not taken a ticket for him, the plaintiff applied to the station master for a ticket, but was refused. He was, however, allowed to continue his journey. At Bálásár the plaintiff repeated his attempt to obtain a ticket, but was again refused. However, he was allowed by the guard to proceed with the train, and did so until it arrived at Dhándu. This conduct on the part of the railway officials at intermediate stations, if indeed it amounted to leave and license to the plaintiff to travel in the train without a ticket, could only operate as such until the train stopped at the next station. On arriving at Dhándu, where it appears tickets are examined, both the plaintiff and his master, on his behalf, made strenuous efforts to obtain a ticket, offering at the same time to deposit with the station master any sum he might require. Not only, however, was this refused, but the plaintiff was forbidden by the station master to enter the carriage, and upon his doing so, was removed by his orders and not allowed to continue his journey to Bombay. The

1875.

PRATAP
DAJI
v.
BOMBAY,
BARODA, AND
CENTRAL
INDIA
RAILWAY.

(1) 1 L. R. Q. B. 10.

(2) *Id. Ib.* 14.(3) *Id. Ib.* 15.

1875.
PRATA'B
DA'JI
v.
BOMBAY,
BARODA, AND
CENTRAL
INDIA
RAILWAY.

Judge, who tried the cause, held that the station master was bound to give the plaintiff a ticket, and if this were so, it might be that the station master would not have been justified in treating the plaintiff as a trespasser and removing him. We are, however, of opinion that there was no such legal obligation. The common law right of a traveller to be conveyed, by the carrier of passengers on his readiness to pay the usual fare, is subject to the condition that he offer himself as a passenger at a reasonable time and place. It would be most inconvenient and unreasonable, we think, regarded from a public point of view, were we to hold that a passenger by a train has a right to require the station master, on the arrival of the train at an intermediate station, to leave the platform, where he has special duties connected with the train and passengers, and return to his office for the purpose of procuring him a ticket. It is the general practice at intermediate stations for the station master to close the office for the distribution of tickets on the arrival of the train. This practice has been adopted to enable the officials, and more especially the station master, to attend to the particular matters which arise during the stoppage of the train in the station; and we can see no ground upon which a passenger by a train can claim to have the distribution of tickets resumed on his behalf, which had been already closed for the public outside the station. In the present case, moreover, it would have been necessary, in the first place, for the station master to have heard the plaintiff's story; decided upon its correctness; and determined what he was bound to pay as far as Dhándu, before he could, with due regard to the interests of the Company, have given him a ticket from Dhándu to Bombay; as otherwise it is plain that the fare from Surat to Dhándu might have been lost to the Company. We think, therefore, that there was no such legal obligation on the part of the Company to furnish the plaintiff with a ticket as was contended for; and that the station master was, under the circumstances, justified in removing the plaintiff from the train. The rule must, therefore, be made absolute. Parties to pay their own costs of the rule for a new trial and of the reference.

[APPELLATE CIVIL JURISDICTION.]

*Miscellaneous Special Appeal No. 23 of 1874.*1875.
Dec. 6.

JIBHAI MAHIPATI AND ANOTHER (ORIGINAL OPPONENTS, APPELLANTS) v.
PARBHU BAPU AND ANOTHER (ORIGINAL APPLICANTS, RESPONDENTS).

Limitation—Decree—Execution—Application—Act XIV. of 1859—Act IX. of 1871.

An application for execution of a decree was made in February 1868, and proceedings sufficient to bar limitation under Act XIV. of 1859 were going on till 30th September 1871. The next application for execution of the decree made in October 1872 was held to be barred under Act IX. of 1871, as more than three years had elapsed on that day from the date of the application in February 1868.

Held also, following *Gowree Sunkur v. Arman Ali* (21 Cal. W. R. 309 Civ. Rul.), that an informal application, made on 30th September 1871, in the nature of a petition to the Subordinate Judge to give effect to the application of February 1868 by overruling certain objections of the Collector and enforcing execution of the decree, was not an application for the execution of a decree such as could bar limitation under Act IX. of 1871.

THIS was a special appeal from the decision of W. H. Newnham, Judge of the District of Ahmedabad, reversing the order of the Subordinate Judge of Dhandhuka.

The facts of the case are these:—The special respondents on the 28th of August 1867 obtained a decree against the special appellants in the Court of the Subordinate Judge of Dhandhuka for the payment, out of the property of the second defendant's grandfather, of a principal sum of Rs. 956, together with their costs of the suit, which amounted to Rs. 134-14-0, and interest on judgment at 6 per cent. per annum payable by monthly instalments. For the execution of this decree the special respondents presented in the Court of the Subordinate Judge applications for execution in the usual form, the last of which before the application, the subject of the present appeal, was presented on the 28th of February 1868, and stated the mode in which the Court's assistance was required as follows:—"I claim in all Rs. 1,130-8-11. In respect of the same I apply as follows: about Rs. 5,700, being the amount of *huk* appertaining to the Virámgam Bandhi *watan* of the deceased Mahipatbhái is become obtainable from his honor the Collector by Jethálál Lalubhái (the second defendant). The same will, therefore, be obtained either by him or on his behalf by his guardian. But this amount of money is a part of the property

1875. of the deceased Mahipatbhái, and my decree is made recoverable from his property, and the defendant Jethálál is the son of the said Mahipatbhái. I, therefore, pray that, under Section 237 of the Act No. VIII. of 1859, the amount mentioned in this *darkhást*, Rs. 1,130-8-11, out of that sum be attached and sent for and paid to me." An order of the same date was made and indorsed on this application in the following words:—"In respect of this matter a notice should be drawn and sent to his honor the Collector Sahib of Ahmedabad in accordance with Section 237 of the Civil Procedure Code." A notice was accordingly issued to the Collector, but he raised various objections to complying with the notice, and a long correspondence followed between the Subordinate Judge, the Collector, and the Revenue Commissioner, the result of which was the payment to the plaintiffs, by the Collector, out of the moneys in his hands, of the principal sum, and a portion of the remainder of the moneys claimed by the plaintiffs, on the 10th of September 1872, the plaintiffs abandoning their claim to the unpaid balance. In the meantime, and while the correspondence was going on, the plaintiffs, on the 30th September 1871, had presented to the Subordinate Judge an informal application, or petition, praying him to overrule the Collector's objections, and enforce execution of their decree, in the following terms:—"Claim Rs. 956. We plaintiffs pray as follows:—There was some money lying in the Collector's treasury in respect of the deceased Mahipatrám Ranchod's *huk*, and a *darkhást* was made by us to attach it according to Section 237, Act VIII. of 1859. The Collector Sahib raised various objections to the order of the Court with regard to that money, and thereby caused delay. Finally, upon a letter from the Collector, dated the 25th of August 1871, the Court ordered us to produce a certificate to show in whose name the money was credited. Thereupon we tried to get a certificate as follows:—We made an application, dated the 7th of September 1871, on a stamped paper of the value of 8 annas, and sent it to the Collector. This application was made for obtaining certified copies of extracts from the Dhanduka and Virámgam *petta* account books for the years Samvat 1921-22-23 and 24, in which there were moneys credited in the name of the deceased Mahipatrám and his heirs. But in reply thereto the Collector wrote to us that the *petta* account books show how much the *Sarkar* owes to people, and

JIBHAI
MAHIPATI
v.
PARBHU
BAPU.

therefore, a copy of an extract thereof will not be given to you. The petition, having been thus indorsed, was returned to us. An application was made by us to the Mámlatdár Sahab of Dhandhuka for obtaining copies of extracts from the *pottu* account books, and on supplying stamped paper we obtained copies of extracts from account books for the years Samvat 1921-22-23 and 24. Look, Sahab, it will be clear to you from the particulars of this case and from the correspondence of the Collector Sahab, which is every time new, that the contentions and objections which the Collector raises are unlawful. Finally, we attempted to get copies in the aforesaid manner, but copies were not given to us. Therefore you are to judge from this that the Collector wishes to raise unnecessary objections, and nothing else. It is not proper for the Collector to raise such objections. He ought to have lawfully sent the money attached, in compliance with the order of the Court, and if the Collector does not himself claim this money, then the person having a claim thereto is at liberty to use lawful means to recover the money. Therefore you are at liberty to remove these unlawful objections which he raises." The Subordinate Judge apparently made no order on this application, but, after the payment of the principal sum on the 10th September 1872, a further order of that date was made and indorsed on the formal application of February 1868 in the following terms:—"Agreably to the above order (*i. e.*, the first order on the application directing the despatch of a notice to the Collector) a notice was sent. In this matter of sending for the money a correspondence went on till, at last, a *carát* for Rs. 1,117-5-8 came with an indorsement by the Mámlatdár of Virámgam, dated the 23rd of July 1872. The same order was presented at the treasury of the Mámlatdár of Dhandhuka, and the amount mentioned therein was sent for, and the same being received was this day paid to the heirs of the plaintiff Bapu in satisfaction of the decree, and a receipt, No. 130, was taken in the account book of this Court. Rs. 13-3-3, the balance of this *darbhást*, and Rs. 7-8-0, miscellaneous costs, making together Rs. 20-11-3, remain yet due. This amount the Collector Sahab by his indorsement No. 6, dated the 6th of April 1872, objected to send, as being an item due prior to the *watan* settlement. But the heirs of the deceased plaintiff have put in an application giving up the right to contend for the sending

1875.

JIMIA'F
MAHIPPET
P. PAREHU
BAPU.

1875. for of that amount. Hence nothing remains to be enforced under this decree. Therefore this *dekhlást* is recorded as disposed of." The application of April 1868 being thus finally disposed of, and the plaintiffs being desirous to recover interest on the judgment-debt awarded to them by the decree, but not included in that application as having accrued due since its date, a fresh application for the enforcement of the decree in respect of the recovery of this interest was presented to the Subordinate Judge of Dhandhuka by the plaintiffs on the 19th of October 1872, which application was the subject of the present appeal.

The judgment-debtors objected that the application was time-barred, and the Subordinate Judge, allowing the objection, rejected it.

In appeal the decree-holders urged that there was no laches on their part, that they were *bonâ fide* and diligently prosecuting their claim, and that Act IX. of 1871 did not apply to their case, but Act XIV. of 1859, Section 20. The Judge was of opinion that the former Act should be applied to the case; but he held that the application of the decree-holders on 30th September 1871, praying for the removal of the Collector's objection, though not in the form prescribed by the Code of Civil Procedure, was substantially one for enforcement of the decree. He, therefore, reversed the order of the Subordinate Judge and decreed execution.

The special appeal was heard by WEST and NA'NA'BHA'I HARIDA'S, JJ.

Gokáulás Kákháulás for *Dhirajlál Mathuráulás*, Government Pleader, for the appellants, the judgment-debtors.—The application of 30th September 1871 was not such as is contemplated by Article 4 of Act IX. of 1871, and was itself barred, the last previous application having been made in February 1868. Section 212 of the Civil Procedure Code settles what the application is to be which will bar limitation.

Nagíndás Tulsidás, for the decree-holders.—The principal sum was paid in September 1872. There was no laches on the part of the decree-holders, who did all they could till the new Law of Limitation of 1871 came into force. This should not be applied to this case.

WESER, J.—The application in this case was presented for execution of a decree, the last prior application for execution of which had been made in February 1868. Upon that earlier order, partial execution had been obtained and proceedings sufficient apparently to bar limitation under the Act of 1859 had been going on till 30th September 1871. The application made to the Court on that day was not one which, according to the case of *Gourree Sunkar Tribhoo v. Arman Ali Chaudhry* (1), could bar limitation under Act IX. of 1871. It was, indeed, merely a request or suggestion that the Collector should be directed to carry out a direction sent to him in 1868 in a particular way; but if it had been an application of a kind which in itself could serve as a bar to limitation, it was then already too late on the day when it was made, which was more than three years after February 1868, and, being thus inadmissible, could not mark a point of time from which a fresh period of limitation could be counted extending over October 1872, when the application was presented, with which we have now to deal. It has been urged that, as execution was in a manner going on, and interest was accruing due under the decree, the time when each instalment should have been paid ought to be reckoned as the day when the decree became operative, and that the period of limitation would thus be counted from a time within three years of October 1872, but we do not think that because interest may be awarded, it was intended by Act IX. of 1871 to keep a decree perpetually in force without renewed application. It may be rather hard upon the judgment-creditor in this case that, although he was doing all that the old law required until the new law came into force, and, indeed, for some time afterwards, he should suddenly find himself barred by a provision of a much more stringent character than that of the old law; but the change was no doubt made advisedly, and in an analogous case, *Abul v. Loo* (2), Willes, J., said:—"I utterly repudiate the notion that it is competent to a Judge to modify the language of an Act of Parliament in order to bring it into accordance with his views as to what is right or reasonable" (3). We must give effect to the law as we find it, and the law barred the application in this case.

1875.

JIBHAI
MAHIPALL
v.
PARSHU
BAPU.

(1) 21 Cal. W. R. 300 Civ. Rul.

(2) L. R. 6 C. P. 395. (3) *Id. ib.* 371.

1875. We may observe that, if the order made on the previous application of the respondent is still unexhausted by there being matter to which its terms apply in particulars as to which these terms have not yet been satisfied, it is apparently open to the Court to give effect to that order, notwithstanding that any new application for execution is barred.

JIBHA'I
MAHIPATI
v.
PARBHU
BAFU.

The order of the District Judge is reversed, and that of the Subordinate Judge restored, but we make no order as to costs of this appeal.

Order accordingly.

[APPELLATE CRIMINAL JURISDICTION.]

Reference No. 138 of 1875.

REG. v. DEVA'MA' AND SOMSHEKHAR.

Dec. 8

The Code of Criminal Procedure (Act X. of 1872), Sections 215 and 296—Compounding of offences—Revival of Prosecution—"Dismissal" of a warrant case—Practice—Counsel.

A warrant case of a nature not compoundable under Section 214 of the Indian Penal Code was "dismissed" on the parties coming to an amicable settlement.

Held that the "dismissal" was equivalent to a discharge under Section 215 of the Code of Criminal Procedure, and the composition did not affect the revival of the prosecution, if that should otherwise be thought necessary or expedient.

Counsel cannot claim as of right to be heard on a reference to the High Court under Section 296 of the Criminal Procedure Code.

This was a reference from A. R. Macdonald under Section 296 of the Code of Criminal Procedure for the orders of the High Court.

The facts of the case are briefly as follows :—

Some time in 1874, Subhadrá, widow of the late Ráji of Belgí, in the district of North Kanara, complained to Mr. Middleton, Magistrate, F.C., that her residence had been broken into, and her ornaments, valued at about Rs. 7,000, abstracted by one Devámá and her son Somshekhar. The latter asserted that, having been adopted by the complainant, he was the owner both of the palace and the property, which he admitted he had removed. After the inquiry had proceeded a certain length, Mr. Middleton disposed of the case by the following order :—

"They (the parties) have now come to an agreement, and Subhadrá has withdrawn her complaint on condition that she receives certain ornaments and a certain 'sári', which the other party agree to give her. I have, therefore, given these articles to her, and the rest to Somshekhar and Devámá, and I dismiss the case."

1875.

REG.

DEVÁMÁ AND
SOMSHEKHAR.

This was on the 18th of January 1875. Mr. Middleton quoted no authority in the body of the order, but in submitting his monthly return he remarked that the accused persons were discharged under Section 215 of the Code of Criminal Procedure.

Disagreements having since arisen between the parties, it was thought expedient to revive the prosecution. An application was accordingly made to that effect to Mr. Jervoise, the successor of Mr. Middleton in office. It was then urged before him that what Mr. Middleton really intended to do, was to allow the offence to be compounded under Section 188 of the Criminal Procedure Code, and that Mr. Middleton's remark in the Criminal Return was of non-effect. Mr. Jervoise allowed the contention; but, in view of the illegality of Mr. Middleton's order, allowing a non-compoundable offence to be withdrawn, and of its impropriety in not having effected the desired reconciliation, he submitted the proceedings to the High Court, through the Magistrate of the District, under Section 296 of the Code of Criminal Procedure.

The reference was heard by WEST and NA'NA'BHAI HARIDA's, JJ.

Branson, instructed by *Shúmrór Vithal*, applied to be heard on behalf of Somshekhar and Devámá before the Court disposed of the reference, but it was decided that he was not entitled to appear under the Code of Criminal Procedure.

No one appeared in support of the reference.

PER CURIAM :—The accusation made against the accused in this case constituted it a warrant case falling under the provisions of Sections 213 *et seq.* of the Code of Criminal Procedure. The Magistrate, Mr. Middleton, after an arrangement had been come to between the parties, divided the property between them and dismissed the complaint. By "dismiss the case" we understand the Magistrate to have meant the same thing as is indicated by Section 215 of the Code of Criminal Procedure, where it says that

1875. "the Magistrate, if he finds that no offence has been proved
 REG. against the accused person, shall discharge him" "Dismissal of
 a complaint" is a phrase properly applicable only to a summons
 DEVA'MA' case under Chapter XVI. of the Code, and incapable of being
 SOMSHAKHAR. applied, as Section 212 shows, to any complaint, "except in so
 far as it refers to a summons case" The provisions of Section
 215 are highly useful in many cases. They enable a Magistrate,
 when circumstances make it expedient, to dispose of an accusa-
 tion without proceeding to an actual conviction or acquittal where
 a strict application of the criminal law would be undesirable. But
 these provisions are open to abuse, and, to guard against their per-
 version, it is explained (Explanation II.) that a discharge is not
 equivalent to an acquittal, and does not bar the revival of a pro-
 secution. In the present case, therefore, the course pursued by
 Mr. Middleton, and which seemed to him the more just and ex-
 pedient, does not bar the renewal of the proceedings, if to Mr.
 Jervoise or the Magistrate of the District such a renewal should
 appear absolutely necessary or highly desirable.

The composition entered into between the parties cannot affect
 the revival of the prosecution if that should otherwise be thought
 necessary. House-breaking in order to commit theft is not an
 offence which, according to Section 214, Indian Penal Code, can
 be legally compounded, and a withdrawal from the prosecution in
 such a case has not, according to Section 188 of the Code of
 Criminal Procedure, the effect of an acquittal. Section 212 of
 the Criminal Procedure Code cannot be applied to the case,
 because it is not a summons case, and there is no such provision
 as that contained in Section 212 in the following chapter on
 warrant cases.

There is no occasion for any order on the part of this Court.
 The case stands free for the exercise of the Magistrate's discre-
 tion, which he will naturally not exercise to the supersession of
 his predecessor's order, unless it should appear that justice requires
 him to adopt that course.

Record and Proceedings to be returned.

* [APPELLATE CIVIL JURISDICTION.]

Special Appeal No. 285 of 1875

SHANKAR RAMCHANDRA (ORIGINAL PLAINTIFF, SPECIAL APPELLANT), &c. 1875
 VISHNU ANANT (ORIGINAL DEFENDANT, SPECIAL RESPONDENT) Dec. 14

Regulation Act XX. of 1866, Sections 17 and 18—Deed of partition

Section 17 of Act XX. of 1866 extends to a deed of partition, and this is not prevented by such an instrument being enumerated in Section 18 amongst those which are optionally registrable.

This was a special appeal from the decision of E Hosking, Assistant Judge of the district of Poona, in Appeal No. 51 of 1875, on the Poona District Court File, reversing the decree of the Subordinate Judge of Junnar in Original Suit No. 287 of 1875.

The plaintiff, Shankar, sued the defendant to enforce partition and for the removal of obstruction to the plaintiff's building a wall and using the water of a well. In support of his claim the plaintiff produced a deed of partition dated 7th January 1865.

The defendant admitted the fact of the deed of partition having been executed, but contended that it had not the effect stated by the plaintiff and had not been acted on, each party having used the property to which it related as suited his convenience in opposition to its terms; and that the deed, not having been registered, was inadmissible in evidence.

The Subordinate Judge awarded the claim; but the Assistant Judge, in appeal, held that the partition deed was invalid for want of registration, and that no secondary evidence could be given in proof of its terms. Being also of opinion that the defendant's admission was insufficient for basing upon it a decree in the plaintiff's favour, the Assistant Judge rejected the claim.

The special appeal was heard by WILK and NA'NA'BHA'I HARIDA'S, JJ.

Mánekshá Jehángíreshá for the appellant.—The only question in this case is whether the deed of partition requires registration. The document bears date the 7th of January 1865, and relates to immoveable property of the value of more than Rs. 100, and is, therefore, one within the scope of Act XX. of 1866. I say first

1875.
SHANKAR
RAV-
CHANDRA
".
VINAYU
ANANT.

that, supposing an instrument of partition to be such a document as declares any right, title or interest, and, therefore, presumably falling within the provisions of Section 17 of the Act which treats of instruments of which the registration is compulsory, yet the operation of this section is excluded by the enactment of Section 18, which enumerates documents voluntarily registrable. In the earlier section there is no mention of an instrument of partition by name; while in the subsequent section it is specifically mentioned.

[West, J.—Section 17 is the more stringent rule, within which a deed of partition may be included by construction though not by special mention; and it is possible to give effect to the two sections by reading the term “instrument of partition” in Section 18 as one relating to moveable property.]

The various documents enumerated in Section 18 do not all refer to moveable property, and the way in which the Legislature has punctuated that section does not authorize such a reading. My second ground of objection is that a deed of partition neither creates nor declares any interest. It is only a memorandum or record of rights which had already been existing in a general way.

Bahiravnath Mangesh for the respondent was not called on to reply.

WEST, J., in delivering the judgment of the Court, said:—The appellant urges that the deed of partition, on which he sues, is excluded from the operation of Section 17 of Act XX. of 1866 by being amongst those enumerated in Section 18, Art. 7, as optionally registrable. We do not think that an instrument, to which one of the terms in that article may be applicable, is freed by that circumstance from the necessity of registration under Section 17, if such necessity otherwise exists. If the instrument is one properly falling under Section 17, apart from the provisions of Section 18, Art. 7, it ranks amongst the documents before provided for; and the specific provision, imposing a necessity for registration, is not superseded by a general provision for optional registration which is satisfied by applying it to instruments such as those affecting only moveable property not included within the scope of Section 17. The more specific rule, regard being had to the purpose of the Act, is that in Section 17

which applies only to some kinds of deeds, while that in Section 18 applies to deeds of partition generally. The provision for optional registration in the latter is not superseded, but supplemented or qualified by that in the former, unless the latter provision is to be read as extending only to cases not already provided for. When enactments are apparently opposed "it is a cardinal principle in the interpretation of a statute" that the one must, if possible, be read as a qualification of the other, so that some effect, furthering the intention of the Legislature, may be given to each—see per James, L.J., in *Ellis v. Boulton* (1) and per Lush, J., in *Reg. v. Hulme* (2); but here when Section 18 says that instruments of partition may be registered, there is nothing really opposed to that provision in another which says that in particular cases they must be registered.

It is said, however, that the instrument in this case is not one that can be fairly deemed to fall within the rules of Section 17, taken by themselves. It does not perhaps create an interest in immoveable property. As to that the Hindu lawyers have expressed different views. But, if it does not create an interest, it seems to us that it at least declares an interest in immoveable property, and that is sufficient, if the value of the property exceeds Rs. 100, to make registration indispensable. In England a partition is made effective by mutual conveyances [Williams Real Prop 129], and it seems impossible to say that an instrument of partition which is issued on, as producing the same results, does not even declare an interest. Here the plaintiff has himself valued his interest under it at more than Rs. 100, and thus the document, not having been registered, could not be admitted in evidence. Its terms and the relations thence arising are not so admitted in the defendant's written statement as to have made all proof of the document superfluous, and we must therefore confirm the decree of the Assistant Judge with costs.

Decree confirmed.

(1) L. R. 10 Ch. Ap. 479; see p. 484.

(2) L. R. 5 Q. B. 377, see p. 368.

NOTE.—An opinion to the opposite effect is expressed in 6 Mad. High Court rulings p. ix.

1875.

SIFANKAR
RAM-
CHANDRA
"VISHNU
ANAN P.

[APPELLATE CIVIL JURISDICTION.]

*Special Appeal No. 206 of 1875.*1875
Nov. 30.KRISHNAJI RAVJI GODBOLE (Plaintiff and Appellant) RAM-
CHANDRA SADA'SHIV (Defendant and Respondent).*Kabulagaddar Khot—Mortgagee—Occupant—Bombay Act I of 1865, Section 2, Cls J, K, and L, and Section 48—Regulation XVII of 1827, Section 3, Cl. 1, and Section 5, Cl. 2—Inferior and Superior Holder—Priority of Estate.*

Regulation XVII of 1827, Section 5, enables the Government, and, therefore, the holder of the rights of Government, on failure of the superior holder to pay the land revenue, to realize it from the inferior holder.

The laws for realizing the land revenue establish a kind of parity of estate between the superior and inferior holders, by which the latter, taking the profits of the land, must satisfy the obligations of the former to Government, independent of, and even in opposition to, any agreement between the two contracting parties. The liability to pay, adheres to the occupation and enjoyment, and cannot be got rid of, except through its resignation by the sovereign or the sovereign's representatives.

Held, accordingly, that when the person who was the "occupant" of certain land within the meaning of the Bombay Survey Act failed to pay the revenue due thereon, the *Kabulagaddar Khot* might recover the amount from that person's mortgagee in possession.

THIS was a special appeal from the decision of A. D. Pollen, Assistant Judge at Ratnágiri, in Appeal No. 322 of 1871, reversing the decree of Chintáman Sakhárám (Jtms, First Class Subordinate Judge at the same place, in original suit No. 125 of 1873).

The plaintiff, Khrishnáji, brought this suit as *Kabulágotdar Khot* of the village of Kele Mazagám for the year 1871-72, and sought to recover the amount of Government assessment due for that year on some land cultivated by the defendant, Rámchandra. The land was the property of one Lakshumbái, who mortgaged it to the defendant under a writing dated the 12th November 1869. The land remained entered in the Government books in the name of the mortgagor, Lakshumbái. The defendant denied his liability to pay, on the ground that he did not cultivate the land. The Subordinate Judge raised two issues: (1) Did the defendant cultivate the land and receive the produce thereof in 1871-72? (2) If so, is the plaintiff entitled to recover? He found both the issue

affirmatively, and in favour of the plaintiff. In appeal the defendant contended that the land had not been entered in the Government books in his name, and that, therefore, he was not answerable for payment of the assessment. The Assistant Judge raised the same issues as those tried by the first Court, but found the second issue negatively, and, therefore, against the plaintiff, whose claim accordingly was thrown out. The following are his remarks on the second issue:—

1875
KRISHNAJI
RA'VJI GOD-
BOLE
v
RA'MCHANDRA
SADA'SHIV.

“On the second point, however, I do not think that there is on the record any evidence to justify me in finding that the defendant is responsible for the assessment to the plaintiff. The plaintiff was *Kabulajatlār Khot* for the year in suit, and as such he is entitled to demand from *Dhārkaris* the amount of assessment on their *Dhārās*. The survey is now in force in the village. It appears that Lakshmibāi, the defendant's mortgagor, is the owner of the *Dhārā* of which the *thikāns* (fields) in dispute are a part. She is the ‘occupant’, and the defendant can only be regarded as her tenant, according to the definition given in the Survey Act. The land is entered in her name, and she, therefore, is the person primarily responsible for the assessment. The agreement made by the defendant with her in the mortgage bond with regard to the payment of assessment appears to me to be binding only on the parties thereto. I do not see that there is any privity of contract between the defendant and the *Kabulajatlār Khot*. * * * I, therefore, think that the plaintiff's claim must fail, as being against the wrong person.”

The special appeal was argued before WEST and NA'NA'BHAI HARIDA'S, JJ.

The Honourable Rār Sāhob V. N. Mamlūk for the appellant.—The respondent has been found by both the lower courts to have cultivated the land in the year for which the amount of assessment is sought to be recovered. The land revenue is a paramount charge on the land, and the respondent, who was in the actual occupation of it, ought to be compelled to pay it.

Vishnu Chanasām for the respondent.—Under Bombay Act I. of 1865, Section 2, Cl. j, the only person recognized by Government with reference to the payment of assessment is the “occu-

1875.
KRISHN'JI
RA'VJI GOD-
BOLL
v.
RA'MCHANDRA
SADA'SHIV.

pant", whose name is entered as such in the Government books. The defendant is not such occupant, and, therefore, not answerable for payment of assessment, though he has been held to have occupied and cultivated the land during the year in dispute.

[WEST, J.—By Section 18 of the Survey Act I. of 1865 the land revenue is to be collected according to the provisions of Regulation XVII. of 1827, and Section 5, Cl. 2, of that Regulation provides that the revenue, if not discharged by the superior holder, may be realized from the inferior holder, who in this case is the defendant.]

The defendant is not the inferior holder within the meaning of that clause. He is a tenant holding under the occupant, Lakshmiabai, as defined by Bombay Act I. of 1865, Section 2, Cl. 1. The preceding Cl. 1 defines a "superior holder" to be the person having the highest right under Government to hold land or to engage with Government for the land revenue due on account of any village or estate. Now the person who in the present instance has engaged with Government for the payment of such land revenue, is the plaintiff, and, therefore, he is the "superior holder", intervening between the Government and the occupant, Lakshmiabai, who consequently is the inferior holder.

[WEST, J.—This interpretation is opposed to Regulation XVII. of 1827, Section 3, Cl. 1.]

WEST, J.—The Assistant Judge has held the mortgagee in possession in this case not responsible for the land revenue of the fields held by him under the mortgage. The plaintiff, as *Kobulá-gatlár Khot*, is recognized by the Assistant Judge as "entitled to demand from *Dhárékaris* the amount of assessment on their *dhárá*"; but Lakshmiabai, the mortgagor, being owner of the *dhárá* in question, and, therefore, occupant according to the Bombay Survey Act I. of 1865, the Assistant Judge has held that she, and she alone, is responsible for the assessment. That she is responsible for it, is true; but it does not follow that she is solely responsible, and Regulation XVII. of 1827, Section 5, enables the Government, and, therefore, the holder of the rights of Government, on failure of the superior holder to pay the revenue, to realize it from the inferior holder, a position which, in the sense of the Regulation, is held in this case by the mortgagee.

It is obvious that, if the occupant only could be made answerable for the rent or revenue due to the Government, it would only be necessary to effect a mortgage in order to defraud the State of its dues. This would be entirely opposed to the purposes of the laws for realizing the land revenue; and, in order to obviate any such result, these laws establish a kind of privity of estate between the superior and inferior holder, by which the latter, taking the profits of the land, must satisfy the obligations of the former to Government independently of, and even in opposition to, any agreement between the two contracting parties. The liability adheres to the occupation and enjoyment, and cannot be got rid of, except through its resignation by the sovereign or the sovereign's representatives.

We must, therefore, reverse the Assistant Judge's decree, and restore that of the Subordinate Judge with costs throughout on the respondent.

1875
KRISHNAJI
RA'JI GOD-
BOLI
v.
RA MCHANDRA
SADA'SHIV.

[APPELLATE CIVIL JURISDICTION.]

Miscellaneous Special Appeal No. 26 of 1875.

BA'KRISHNA BHA'LCHANDRA (ORIGINAL PLAINTIFF AND APPLICANT
SPECIAL APPELLANT) v. GOPAL RAGHUNA'TH (ORIGINAL
DEFENDANT AND OPPONENT, SPECIAL RESPONDENT).

Dec 15.

Hindu Law—Decree—Interest—Rule of 'dāmdupat' not applicable to amounts due on decrees.

The rule of Hindu Law, which limits the amount recoverable at one time by way of interest to the amount of the principal, does not apply to an amount recoverable in execution of the decree of a Civil Court.

THIS was a special appeal against the order of R. F. Mactier, confirming an order of the Subordinate Judge of Karád.

On the 6th of July 1861 the plaintiff, Bákrishna, obtained a decree against the defendant for Rs. 440-5-6, and interest till the whole sum was paid up. On the 14th of February 1871 he presented an application for the recovery of the balance due on this

1875. decree, alleging that the defendant owed Rs. 82-7-0 on account of the principal and Rs. 535-1-6 on account of the interest. The Subordinate Judge awarded the claim, but limited the amount of interest to the amount of the principal sum.

BA'LEKRISHNA
BHAI-
CHANDRA
v.
GOPAL
RAGHUNATH.

Mr. Mactier upheld this decision.

The special appeal was heard by WEST and NA'NA'BHA'I HARI-PA'S, JJ.

Ghunashām Nilkanth Nādkarni, for the appellant, the decree-holder.—The courts below have erred in applying the 'dāmdupat' rule of Hindu Law to this demand, which is based on a decree of the Court. The plaintiff seeks full execution of the decree of the Court. The command in the decree must be obeyed, in supersession, if need be, of the general rule of Hindu Law, and it cannot be said to be obeyed unless the entire sum, whatever it may amount to, due on the decree be paid. The Legislature places no other bar on the fulfilment of a decree, except limitation, and the debtor's insolvency within the sense of the Code of Civil Procedure.

[WEST, J.—Can you cite any cases in support of your contention?] I cannot.

There was no appearance on the other side.

The judgment of the Court was delivered by

WEST, J.—The District Court has confirmed the order of the Subordinate Judge, limiting the amount, recoverable as interest by the judgment-creditor, to a sum equal to the principal sum awarded by the decree. This decision is based on the rule of the Hindu Law which limits the amount recoverable at one time by way of interest to the amount of the principal. But there is no authority for limiting the amount recoverable in execution of a decree by any such rule. As regards purely private transactions, the law for the protection of the weaker party controls his freedom of contract in the way to which we have referred, or, at least, refuses to enforce the debtor's engagement by means of a duty imposed on the Courts of exercising their powers of coercion to give effect to what it presumes to be an extortionate

or unduly rigorous bargain. But the same reason, it is obvious, does not apply to the execution of a decree of a Civil Court. In making such a decree, the Judge is not liable, as the debtor is supposed to be, to undue pressure on the part of the creditor. If public policy requires any limitation of the amount of interest to be recovered, this can be provided for in the decree itself. So long as the decree stands, it alone furnishes the standard for the extent to which execution may proceed, if sought, in the way prescribed by law. The analogy applies of *Keating v. Sparrow* (1) and of *Peachy v. Duke of Somerset* (2).

1875.
BA'LEKRISHN
BHA'L-
CHANDRA
v
GOPA'L
RAGHUNA'TH

We must reverse the orders of the Courts below, and direct the account to be made up with simple interest on the amount of the decree and on payments necessarily or properly incurred by the judgment-creditor, and with simple interest at the same rate as that provided by the decree on each sum received by the judgment-creditor, who is to obtain an order for execution to the extent of the balance, if any, thus found due to him.

Order reversed and account decreed.

[APPELLATE CIVIL JURISDICTION.]

Special Appeal No. 227 of 1875.

Dec. 20

BĀBĀJĪ HARI (ORIGINAL PLAINTIFF, SPECIAL APPLICANT) v RĀJĀRĀM BALLĀL AND ANOTHER (ORIGINAL DEFENDANTS, SPECIAL RESPONDENTS).

Court Fees Act VII of 1870, Section 16—Pauper Respondent—Memorandum of Objections—Civil Procedure Code (Act VIII of 1859) Section 348—Pensions Act XXIII of 1871, Sections 4, 5, 6, 8, 9, and 14—Certificate by Collector

A pauper respondent is not entitled to present objections at the trial of an appeal without payment of stamp duty.

Section 4 of the Pensions Act XXIII of 1871 debars the Civil Court from taking cognizance of any suit whether the Government is a party to it or not, which relates to any pension or grant of money or land revenue conferred or made by the British or any former Government—without a certificate from the Collector or other authorized officer. Section 5 prescribes a remedy for the claimant of such pension or grant, and Section 6 enables the revenue officer to refer the parties to the Civil Court for the determination of the respective interests in the income or other benefit, which the executive will, however, still, as against either or both of the litigants, be at liberty to allow or to withhold.

(1) 1 Bal. and Beat., 367.

(2) 1 Stra 447, 2 Wh and Tud, 979 (3rd edn.); see p 987. •

B 707—*a*

1875. Lands held free of assessment under a grant from Government, which bestows
 BA'BA'JI on the grantee the lands themselves and not merely the Government revenue
 HARI arising from them, do not fall within the provisions of the Pensions Act.
 RA'JA'RA'M THIS was a special appeal from the decision of E. Hosking,
 BALLA'L. Assistant Judge of the District of Sâtára, in Appeal No. 232 of
 1874, reversing the decree of Atchut Jagannath, Subordinate
 Judge of Rahimatpur.

The plaintiff Bábáji *in forma pauperis* sued the defendants, his cousins, to have his right declared to a ninth share in the *Kulkarni, Jyotishi and Deshpánde Watan* of certain villages in the Collectorate of Sâtára. He also claimed eleven years' arrears of this *watan*, which consisted partly of *inám* lands and partly of allowances paid from the Government Treasury.

The defendants pleaded the Limitation Act and urged other objections, which, for the purposes of this report, it is not necessary to notice.

The Subordinate Judge, on the evidence, found the claim proved, except as the alleged share in the *Jyotishi Watan*, and, disallowing the defendants' plea of limitation, gave the plaintiff a decree accordingly.

The defendants in appeal repeated the objections they had taken in the first Court, and for the first time urged that the cognizance of the suit was barred by the provisions of the Pensions Act of 1871, there being in the case no certificate by the Collector, or any other authorized officer, permitting the suit to proceed as required by Sections 4 and 6 of the Act.

The plaintiff under Section 348 of the Code of Civil Procedure presented a memorandum of objections against the refusal of the Subordinate Judge to award him a share in the *Jyotishi Watan*. This bore no stamp, but he urged that he being a pauper no stamp was necessary.

The Appellate Court was of opinion that the respondent, though a pauper, was by Section 16 of the Court Fees' Act not exempted from the payment of stamp duty, and that his memorandum, therefore, could not be admitted. Finding also that there was not the certificate required by Section 6 of the Pensions Act, the Appellate Court reversed the Subordinate Judge's decree, and rejected the plaintiff's claim *in toto*.

The special appeal was heard by WEST and NA'NA'BHA'I HARIDA'S, JJ.

1875.

BA'BA'JI

HARI

v.

RA'JA'RAM

BALLAL

Ghanashām Nilkanth for the special appellant, the plaintiff:--
The *watan*, of which the plaintiff seeks to recover a share, consists of lands as well as money allowances. With regard to the former, no certificate is necessary. See Special Appeal No. 507 of 1873, *Ravji Narayan Mandlik v. the Mamlatadar of Ratnagiri Taluka*, per Westropp, C.J., and Larpent, J., 2nd September 1875. Nor is any certificate necessary in a suit between private parties. The term 'any suit' in Section 4 of Act XXIII. of 1871 should be so construed as to mean only a suit in which the Government or any of its officers is a party. Had the Legislature intended to debar the Civil Courts from the cognizance of all suits relating to pensions or money grants conferred by the Government, it would have said so in more precise and emphatic language than it has done in this or any other section of the Act. So important a privilege as that of suing in the Civil Courts should not be taken away by so imperfectly expressed an enactment. Nor will the Courts divest themselves of jurisdiction unless it be explicitly taken from them by the Act. Section 5 of the Act provides that a claimant of grant of money or land-revenue may go to the Collector for the disposal of his claim, which may be disposed of according to such rules as the chief revenue authority may prescribe (1), or be certified under Section 6 of the Pensions Act as a matter fit for the adjudication of the Civil Courts. But neither Section 5 nor any other section lays down that a claimant shall not go to the Civil Court directly. The joint effect of Sections 4, 5, and 6 seems to be—*first*, that when a person wishes to proceed against a private individual, no certificate whatever is necessary; *secondly*, that if he does ask the Collector to dispose of his claim, he must abide by his decision as arrived at in conformity with departmental rules; *thirdly*, that if dissatisfied with the decision, or expected decision, his only remedy is the permission of the Collector for the trial of the suit by the Civil Court; but, *fourthly*, that if a person chooses to go to the Civil Courts directly without the intervention of the intermediate step, there

(1) These rules were published on 7th August 1873. See the *Bombay Government Gazette* of that date, p. 656.

1875.
 BA'BA'JI
 HARI
 v
 RA'JA'RA'M
 BALLA'L.

is no objection to his doing so. This intermediate step is not altogether superfluous or unreasonable. It is quite consistent with reason to suppose that the Legislature should have provided a short and summary procedure for the disposal of their bounty; but that, at the same time, they should have imposed the necessity of providing a certificate from one of their authorized officers as a condition for a person wishing for a judicial decision after having elected to move for the adoption of the summary procedure.

A pauper respondent is not obliged to pay stamp for his objections. Section 16 of the Court Fees' Act only intended to place a pauper respondent on the same footing as a pauper appellant.

Fándurang Balibhadra :—The property in dispute is all *watan* property attached to offices, the revenue of which is alienated to the grantees. The whole of it is, therefore, amenable to the Pensions Act. The object of this Act is to leave the Government and its officers unfettered in the disposal and distribution of their bounty. It is only in case they feel a difficulty that the Act allows recourse to be had to the Civil Courts. This is a condition precedent to the Civil Court's jurisdiction; and the Legislature has in Section 6 provided a form which that condition is to assume. The Collector's certificate is, therefore, absolutely necessary in all suits independently of whether Government be a party or not. If Section 4 was not meant to exclude suits between private parties, there was no necessity to enact Section 9, whereby an exception is made in favor of suits between *Inámdárs* and their tenants.

Ghanashám Nilkanth in reply :—The object of the Pensions Act is not to control the Civil Courts in determining the relative rights of coparceners but to protect the Government. As long as Government have not to pay more than the aggregate sum admitted by them to be due, it does not matter to them how it is distributed amongst the sharers.

WEST, J., in delivering the judgment of the Court said :—The first point that arises for disposal is, whether a pauper respondent is entitled to present objections at the trial of an appeal without payment of stamp duty under the Court Fees' Act VII. of 1870.

Section 16 of that Act says absolutely that "the Court shall not hear such objections until the respondent shall have paid the additional fee" due under the Act. No exception is made in favour of pauper respondents. It has been argued by Mr. Ghana-sham that a pauper respondent is, when he presents an objection, a pauper appellant, and entitled to the indulgence in that character; but the grammatical construction of the Act does not allow this indulgence to him, and the reason for this probably was that he already had the opportunity of directly making an appeal without expense for court fees, and that an inquiry into his pauperism at the last stage of the case would involve great delay and inconvenience. We do not think, therefore, that there is any good reason for departing from the literal construction of the enactment to which we have referred.

The second point is, whether the claim was wholly or in part placed beyond the jurisdiction of the Civil Courts by the provisions of Act XXIII. of 1871. On the mere grammatical interpretation of Section 4 of that Act no doubt, we think, could reasonably be entertained of its shutting out the jurisdiction of the Civil Courts in a case like the present. Doubt is created only by the anterior improbability of the Legislature's having intended to shut out all co-sharers in public *beneficia* from the ordinary Courts, even for the determination of their relations *inter se*, without expressing that intention more directly and emphatically than it has done in Act XXIII. of 1871. That Act is, in its earlier portion, obviously intended to guard the executive Government against responsibility to the Civil Court; but it has been contended that Section 4 should be construed as extending only to claims made against Government for either the whole or some portion of an alleged alienation or allowance out of the revenues. Section 6, it is urged, would then apply to cases in which the executive, absolute as it is with respect to such matters, might desire to be guided by a knowledge of the legal, or *quasi* legal relations of the parties. But if Section 4 had been intended to apply only to suits against Government and its officers, it is hard to conceive that this should not have been plainly said. As it stands, the section extends to all suits relating to any grant of money made by Government; and the plaintiff, who seeks a share

1875.

BA'BA'JI
HARI
v.
RA'JA'RAM
BALLAL.

1875.
 BA'BA'JI
 HARI
 v.
 RA'JA'RAM
 BALLAL.

in such a grant from his alleged co-sharers, must, we think, be said to bring a suit relating to the grant. Section 5 provides another remedy, such as it is, for the claimant shut out from the Civil Court; and the true intention of Section 6, we think, is to enable the revenue officer, who may be puzzled by the duty which Section 5 casts on him, to refer the parties to a Civil Court for the determination of their respective interests in the income or other benefit which the executive will still, as against either or both of the litigants, be at liberty to allow or to withhold. Section 9 of the Act provides for the case of an *Inámdár* suing his inferior holders or tenants for the land-revenue due to him which, it is said, he may recover as he would recover rent. "Nothing in Sections 4 and 8," it is said, shall preclude him from this remedy, and, unless Section 4 was intended to affect other suits than those against Government, this mode of expression would not have been adopted. Again, Section 14, Art. (8), enables the chief controlling revenue authority to make rules for "reference to the Civil Court under Section 6 of persons claiming a right of succession to, or participation in pensions or grants of money or land-revenue payable by Government," which rules are to have the force of law. A person claiming participation in a payment might, no doubt, go direct to the Collector to ask for it, and then be referred to the Civil Court, without such a course necessarily excluding an alternative resort to the Civil Court and the exercise of the Court's jurisdiction in the case of one seeking, without application to the Collector, to establish his right as against his usurping co-sharer; but this is not the necessary construction, nor, we think, looking to the general purpose of the Act, the most probable one. That purpose appears to be to keep the distribution of what is regarded as a bounty of Government wholly in the hands of its executive officers; and if suits for shares could be brought, and rights or the semblance of rights, established, by some co-sharers, while Government was paying the whole proceeds of a cash allowance to other sharers, the reclamations of the former would at least be embarrassing. They would practically necessitate an investigation by the revenue officer under Section 5, which must terminate by an adjudication similar to that of the Civil Court if it were meant to command any public confidence, or else would entail a reference to the Civil Court under Section 6 with a similar result. Thus,

private parties refused a hearing, or such a hearing as they desired, by the revenue officer, might, so to speak, force his hand, and gain their end by a circuitous process. This cannot have been intended, and the grammatical interpretation of Section 4 prevents such a consequence arising.

1875.
BA'BA'JI
HARI
v.
RA'JA'RA'JI
BALLA'L.

We are of opinion, therefore, that, even when proposing to sue a co-sharer to establish his right to an *aliquot* portion of any allowance paid by Government, the suitor must go to the revenue officers and obtain their permission to proceed, and a corresponding certificate under Section 6. We have arrived at this conclusion reluctantly, and not without some doubts as to its correctness; but, upon the whole, we do not think we can properly construe the Act in any other sense than that which we have given to it.

These remarks apply only to the allowances paid by Government to the family to which the parties belong. As to the lands held by them free from assessment, it has recently been held in this Court by the Chief Justice and Larpent, J., (Special Appeal 507 of 1873) that land held under a grant bestowing them, and not merely the Government revenue arising from them, do not fall within the provisions of the Pensions Act. Mr. Pandurang has contended that there is necessarily a Government revenue arising from the lands in this case, and that it does not appear clearly that the lands, and not merely the revenue arising from them, are held by the parties. But freedom from liability to land-revenue is not identical with holding a grant of land-revenue any more than the extinction of an easement by becoming sole proprietor of the property, servient as well as dominant, is a grant of an easement. The land-revenue arising from a man's own holding, when it is remitted, and the land pays nothing, is rather extinguished than granted. The lands were not in this case claimed for possession *in specie*; but the reason assigned for this is that they are occupied by lessees who cannot be displaced; the point was not raised in the Court of first instance that the claim was one for alienated land-revenue, and we understand it to have extended to the lands themselves, subject, of course, to the rights of the tenants.

We must, therefore, as to the lands in the proceeds of which the plaintiff seeks to establish his right as a sharer, remand the

1875.

BA'BA'JI
HARI
RA'JA'RA'M
BALLA'L.

cause to the District Court, that the Judge, after determining what portion of the claim relates to lands, as distinguished from money allowances, may pronounce on the other points that arise, viz., as to whether the suit was barred by limitation, and as to what deductions, if any, are to be made on account of expenditure necessarily or properly incurred by the defendants out of the property in which the plaintiff claims a share. He will take such evidence as the parties may adduce on these points respectively.

Issues sent for trial accordingly.

1876.
Jan. 19.

[APPELLATE CRIMINAL JURISDICTION.]

Application for Revision No. 193 of 1875.

IN RE JAGJIVAN NA'NA'BHAI.

Sanction for prosecution—Decree of Bombay Court of Small Causes—Reference by District to Subordinate Judge to execute it—Power of latter to proceed against immovable property—Section 287 of the Code of Civil Procedure (Act VIII. of 1859) and Section 78 of Act IX. of 1850.

Although the Court of a Small Causes at Bombay has power to enforce its decree against moveable property only, yet if that decree be transmitted to a Court to which the Code of Civil Procedure applies, the latter can, under Section 387 of that Code, enforce it against immovable property also.

Query—Whether a Court executing the decree of a Small Cause Court under Section 78 of Act IX. of 1850 could enforce it against immovable property.

THIS was an application for revision, under Chapter XXII. of the Code of Criminal Procedure, of the order of W. M. P. Coghlan, Judge of Tháná, sanctioning the institution of criminal proceedings against the petitioner.

In 1872, Premá Paná and two others obtained a decree against Shridhar Balkrishna in the Bombay Court of Small Causes. For the enforcement of this decree they presented to the District Judge of Tháná an application in the form prescribed by Section 212 of the Code of Civil Procedure, and alleging that the judgment-debtor had two salt pans at Trombay, in the Tháná District. The application did not, however, on the face of it state whether it was made under the Civil Procedure Code, or under Act IX. of 1850. The Judge entrusted the application for execution to the Subordinate Judge, who ordered an attachment and sale of

these salt-pans. In the course of the proceedings which followed, the Subordinate and District Judges considered that the present petitioner Jagjivan Nánábhái had given and fabricated false evidence. On the 25th of October 1875 the District Judge gave his sanction for the prosecution of Jagjivan and others.

1876.
IN RE
JAGJIVAN
NÁ'NÁ'BHÁ'I.

Jagjivan prayed the High Court to annul the sanction, alleging in his petition that the proceedings before the Subordinate Judge were, *ab initio, coram non judice*, as he had no authority to attach and sell immoveable property in execution of a decree of the Bombay Court of Small Causes.

WEST and NÁ'NÁ'BHÁ'I HARIDA'S, JJ., on the 24th November 1875, granted a rule *nisi* in the following terms:—

“ There appears to be some room for question whether, according to Section 78 of Act IX. of 1850, the Court of the Subordinate Judge at Tháná had jurisdiction, notwithstanding Section 382 of the Code of Civil Procedure, to entertain the application for execution made by the judgment-creditors Premá Paná and others; and, if there was a want of jurisdiction whether the statements made before the Subordinate Judge in the subsequent proceedings can be the subject of a prosecution for wilfully giving false evidence or for producing forged documents in a judicial proceeding. The Court sends for the proceedings, and calls upon the complainant to show cause why the sanction should not be annulled. The District Judge to be informed of this order that he may, if he thinks it desirable, instruct counsel or pleader to support the order made by him.”

January 19, 1876.—*Marriott*, instructed by *Dhirajlál Mathurádás*, Government Pleader, appeared to show cause:—The petitioner and the other defendants are themselves the parties who set the Courts of the District and Subordinate Judges in motion. Supposing the action taken by them was under Act IX. of 1850, the provisions of Section 78 of that Act have been complied with as the first application for execution was made to the District Court. But the application was really under the Code of Civil Procedure. It is in the form prescribed by Section 212; and Section 382 shows that the Code extends to execution of decrees passed by Presidency Small Cause Courts. This being so, Section 287 of the Code

1876.
IN RE
JAGJIVAN
NA'NA'BHA'L.

enables the District Court to refer the application for execution to the Subordinate Court, and the latter Court to execute it as if it were a decree of its own; in other words it could proceed against immoveable as well as moveable property. In a preliminary question like this it is sufficient to make out only a *prima facie* case of jurisdiction. It is quite open to the petitioner to object to the jurisdiction at his trial. *Prima facie* jurisdiction having been shown, and the District Judge having actually granted the sanction in the exercise of his discretion, it is not competent to the High Court to disturb it.

Branson (with him *Shivshankar Govindrām*) in support of the rule:—It is certain that the Presidency Small Cause Courts cannot enforce their decrees against immoveable property; and it is strange that other Courts which must, in execution matters, in a sense act ministerially, should possess the power denied to those Courts which passed those decrees. Under Section 78 of Act IX. 1850 the jurisdiction cannot be supported, and the Code of Civil Procedure in its entirety has never been extended to Presidency Small Causes Courts. Act XXVI. of 1864, Section 15, enabled Government to declare the whole or any part of the Code applicable to Small Causes Courts; and accordingly they did, on the 12th September 1872, extend the operation of certain sections, but amongst these the sections as to execution of decrees are not included. Moreover, the fact that, to enable the Mofussil Small Cause Courts to enforce decrees against immoveable property, the Legislature had to enact Section 20 in Act XI. of 1865, and impose the condition of first proceeding against and exhausting moveable property, shows conclusively that immoveable property was not meant to be touched by any Court in execution of decrees of Presidency Small Cause Courts. *Heeralal Bose* (1). All the proceedings are thus *ultra vires*, and the sanction must be quashed.

WESR., J., in delivering the judgment of the Court, after stating the facts, proceeded as follows:—

In arrest of those proceedings [the criminal proceedings], which are now pending, Jagjivan applies to us and urges, *inter alia*, that the proceedings before the Subordinate Judge of Thanā were *coram non iudice*, he having no authority to attach and sell

(1) 4 Sevestre 41.

immoveable property in execution of the decree of the Bombay Court of Small Causes, which itself could proceed against moveable property only. It was argued by Mr. Branson on his behalf that Section 287 of the Code of Civil Procedure did not give to the Subordinate Judge greater power in execution matters than the Court which passed the decree.

1876.

 IN RE
 JAGJIVAN
 NA'NA'BHA'I.

We cannot say why, when the Legislature enacted Section 287 of the Civil Procedure Code, it allowed Section 78 of the Presidency Small Cause Court Act IX. of 1850 to stand. Looking, however, to the wording of the former enactment, we find that it runs as follows :—“ The copy of any decree, or of any order for execution, when filed in the Court to which it shall have been transmitted for the purpose of being executed as aforesaid, shall, for such purpose, have the same effect as a decree or order for execution made by such Court.” Section 78 of Act IX. of 1850 runs thus :—“ Whenever any defendant, against whom judgment shall have been given in the Court of Small Causes, shall go, before execution thereof, out of the jurisdiction of the Court, the Judge of any zillah or town where he shall be found, upon receiving from the plaintiff, either in person or by vakil, an application in writing setting forth these facts, with a duly authenticated copy of the judgment of the Court, shall execute the said judgment in the manner prescribed by law for execution of his own decrees.” There is a difference in the language of the two enactments, and the difference is significant. The former attaches the same effect to the decree of the Court which passed it as if it were the decree of the executing Court; the latter prescribes that the procedure in execution shall be the same, but this is not inconsistent perhaps with the executions being limited by the nature of the decree. An exception may be imagined excluding particular species of property from being touched at all. This change of expression in the later law cannot be ascribed to mere carelessness or oversight; it is capable of being explained; and the intention of the Legislature is to be ascertained from the grammatical sense as applied to the object in view: *Eastern Counties Railway Company v. Marriage* (1). The Bombay Court of Small Causes had no

(1) 9 H. L. Ca. 32. See p. 36; S. C. 31 L. J. Exch. 73. 7 Jur. N. S. 53. 8 W. R. 748.

1876.
IN RE
JAGJIVAN
NA'NA'BHA'I.

machinery to execute decrees against immoveable property ; but the Legislature, having amply provided for it in the Code of Civil Procedure, might well have given to the Courts governed by the Code of Civil Procedure a power which it denied to the former Court. Section 284 of the Code enacts that "a decree of any Civil Court within any part of the British territories in India * * * which cannot be executed within the jurisdiction of the Court whose duty it is to execute the same, may be executed within the jurisdiction of any other Court in the following manner." By this provision the Legislature has placed the entire machinery which it has constituted by the following sections at the disposal of every Civil Court within any part of the British territories in India, irrespective of its jurisdiction, except where special limitations are prescribed, as in Act XL of 1865, and it cannot be denied that the Bombay Court of Small Causes is such a Court as comes within the provisions of Section 284. The construction contended for of Section 287 cannot be put upon it without the addition of some such words as the following :—"But if such a decree or order shall be that of a Court of Small Causes, it shall have the same effect as if the executing Court were acting as a Small Causes Court." We cannot, of course, make such an addition to the section when we find that the grammatical construction of its words, as they stand, is quite consistent with the general purpose of the Act.

The decree of the Small Cause Court in this case was referred for execution by the District to the Subordinate Judge, and this was perfectly legal under the concluding clause of Section 287.

The District Judge was, therefore, quite within his province in giving his sanction to the prosecution of the applicant who, he as well as the Subordinate Judge thought, had committed perjury and forgery before the latter. With the exercise of his discretion on the merits of the case we do not interfere. The application must be rejected.

Note.—In *Reg. v. Hayalibi* (unreported) WRST and NA'NA'BHA'I HARIDA'S, JJ., held that the High Court had no authority to interfere with the discretion to grant a sanction for prosecution, even in a case in which the High Court would not have granted the sanction itself. See also on this subject *Barhat-ul-lah v. Rennie* [1 Ind. L. R. (Allahabad) 17].

[APPELLATE CIVIL JURISDICTION.]

Jan. 24.

1876.

*Regular Appeal No. 67 of 1871.*DEVARĀV KRISHNA [ORIGINAL PLAINTIFF, APPELLANT] *v.*

HĀLAMBHĀI AND ANOTHER (ORIGINAL DEFENDANTS, RESPONDENTS).

Res judicata—Section 2 of Act VIII. of 1859—First suit against defendants as principal—Second as agents.

A previous suit in which the plaintiff elected to sue the defendants as principals bars a second suit on the same contract in which the same defendants are charged as responsible agents under a trade usage.

THIS was an appeal from the decision of Mukundráya Manirāya, First Class Subordinate Judge of Surat, holding the plaintiff's claims barred by Section 2 of Act VIII. of 1859.

The appeal was heard by WEST and NA'NA'BHA'I HARIDA'S, J.J.

Shántārām Nārāyan for the appellant, the original plaintiff.

There was no appearance for the respondents.

The facts and arguments of the pleader, in so far as they are material for the purposes of this report, appear fully from the following judgment of the Court delivered by

WEST, J. — In the former suit between the same parties who are now before the Court, the plaintiff alleged that the defendants had engaged to furnish him with a quantity of firewood to be procured from other persons, and sued for damages for its non-delivery. The defendants answered that they had acted merely as the plaintiff's agents in making a contract with a third party, and were not responsible for the fulfilment of the contract. The material issue raised by the Court of first instance was, whether the defendants had themselves contracted to deliver the wood, and the decision was that they had not. After the case had been heard, the plaintiff sought to have another issue raised on the question of whether the defendants, as agents, were, by usage, liable for the non-fulfilment of the contract, but this was refused by the Subordinate Judge on the ground that it would essentially change the nature of the suit. In this the Subordinate Judge was quite right, as may be seen by reference to the observations of Lord Cairns in *Browne v. McClintock* (1),

(1) L. R. 6 Eng. and Ir. Ap. 434. See p. 453.

1876.
 DEVRA'Y
 KRISHNA
 v.
 H'ALAM-
 BHAI.

In regular appeal the plaintiff complained of this refusal. The District Judge held that evidence of a liability of the defendants analogous to that of a *del credere* agent could have been given under the first issue, that of whether the defendants had contracted to deliver the wood. He, therefore, upheld the decision of the Court below.

In special appeal it was objected that the District Judge had been wrong in holding that, on the "vague" issue raised by the Court of first instance, the plaintiff could and, therefore, ought to have brought forward any evidence that he had tending to establish the defendants' liability by trade usage as agents. It was also urged that the most material issue had not been raised and dealt with, namely, that of the responsibility of the defendants in their character of agents.

The High Court affirmed the judgment of the District Court; and, as no judgment was recorded in special appeal, we must gather the grounds of the decision by inference. What first suggests itself is, that the learned Judges adopted, in its full extent, the judgment of the District Court holding that the plaintiff might have established a liability against the defendants as guaranteeing agents on the issue laid down by the Subordinate Judge. In that case it is clear that no second suit could be brought on the same transaction to make the defendants liable as agents. The cause of action against them in that capacity would have been conclusively determined to have been involved and dealt with in the former suit.

Mr. Shántarám, however, contends that the decision of this Court amounts to no more than a conclusive assertion that the plaintiff could not recover on the issue actually raised by the Court of first instance according to the proper construction of that issue. This construction, he maintains, limits the question and was treated by the Subordinate Judge as limiting it, to whether the defendants contracted for delivery by themselves or not. The judgment, therefore, he argues, is not an estoppel to a fresh suit based on a liability of the defendants as agents: the issue formerly pressed for on this point may have been refused as inconsistent with the plaint in that case. On this we observe

that if this Court did not adopt the grounds taken by the District Judge on any particular point, it would probably have said so. But, even if we hypothetically rest the judgment on the proposed basis, what comes out is this. The plaintiff, on his contract with the defendants, sued them as principals. They answered that they had been mere agents. The plaintiff then had the option either of admitting the agency, but adding "yet by trade usage you are responsible like principals," and asking for an issue on that point, or of not admitting the agency as likely to militate against his interests suing on the particular contract upon which he rested. He chose the latter course; the issue was framed on the question of whether the defendants were liable as principals. By accepting this, and not in due time asking for another issue based on an assertion of a *del credere* agency or one similar to it, the plaintiff, we think, conclusively elected to treat the contract as one binding the defendants as principals. Whether he then succeeded on the issue or not could make no difference for the purposes of a second suit. The cases are common in which a plaintiff having the choice of an action of tort or on contract is barred, once his selection is made, from a second action, whatever may be the event of the first. Still less is it allowable, we think, when a plaintiff has chosen to treat a transaction as creating a contract of one description, to sue a second time upon it as creating one of a different description producing a different kind of liability. The choice in this instance was, it is true, of a negative or passive character. The Subordinate Judge raised the issue; the plaintiff merely did not object to it. But by not objecting he accepted it; accepted it with the defendants' plea of agency plainly set out before him, and with a full opportunity, if he desired it, of having such issues raised as should be requisite for trying the question really at issue between the parties. Under these circumstances he has, we think, no more claim to sue on the contract as admitting of another interpretation, raising a different issue, than in the *Katama Nachiar case* (1) the appellant, after having allowed a case to proceed to judgment on his election to treat a document as non-testamentary, had to sue afterwards on the same document as a will.

(1) *Katama Nachiar v. Raja of Shivagunah*, 2 Calc W. R. 31 P. C.; S. C. 9 Moore, I. A. 539.

1876.

DI. VRA'V
KRISHNA
v.
HA'LAM-
BHAI.

1876.

DEVRA'V
KRISHNA
r.
HA'LAM-
BHAI.

Mr. Shántarám has contended that a second suit was competent to the plaintiff in this case, because it would have to be supported by different evidence from that required to sustain the claim he formerly advanced, and this test of a difference in the evidence is generally applicable as explained in *Aunapurmal's case*, R.A. 55 of 1873, decided by us on September 30th, 1874, but subject always to the observations made in that case and in the case of *Sridhar v. Núrúyana and another* (1). In the present instance the origin of the litigation was identical for the two suits, and the essential facts would have to be established by the same evidence. *Kassee Kishore v. Kristo Chander* (2). The difference is merely one partly of the construction of the contract which is not a matter of evidence, partly of usage having the effect of annexing to the contract certain incidents not expressed and not expressly excluded. Such a usage, if submission to it was optional, would not have the operation sought to be ascribed to it; if binding, it would operate as a local law. This, if it had already been ascertained, it would be the Judge's duty to apply, apart from any evidence adduced in the case; if not, he would, of course, receive evidence of its existence and acceptance as a law; but taking evidence of this kind would not make the case a different one in the sense necessary to exclude the operation of the estoppel. It would not be different evidence as to the facts of the case; as to these the same witnesses would have to be called to depose to the same particulars, but additional information supplied to the Judge as to a part of the law, and which he might equally well obtain from books, decisions, or any other authentic sources of instruction. Applied, therefore, in the intended sense, the proposed test is fatal to the plaintiff's right to prosecute the present suit. We must, therefore, confirm the decree of the Subordinate Judge.

Decree confirmed.

(1) 11 Bom. H. C. Rep. 224.

(2) 22 Cal. W. R. 464 Civ. Rul.

[APPELLATE CIVIL JURISDICTION.]

Special Appeal No. 441 of 1874.

TĀRĀCHAND PIRCHAND (ORIGINAL PLAINTIFF, SPECIAL APPELLANT)
 v. LĀKSHMAN BHĀVA'NI (ORIGINAL DEFENDANT, SPECIAL RESPONDENT).

1875.
 Dec. 22.

Mirās—Rāzināmā—Extinction of Mirās right.

B, a *Mirāsdār*, addressed a *rāzināmā* to the *Māmlatdār*, resigning certain *mirās* lands in favour of *L* (to whom at the same time he delivered possession of the lands), and containing no reservation or qualification: *Held* that the transfer to *L* was complete and the rights of *B* wholly extinguished.

THIS was a special appeal from the decision of C. B. Izon, Joint Judge of Tanna at Nāsik, in appeal No. 68 of 1874, reversing the decree of the Subordinate Judge of Sinnar in original suit 775 of 1872.

The facts, which, for the purpose of this report, may be taken as proved, are as follows:—

One Haibati was the *Mirāsdār* of a piece of land. After his death his son Bhāgu, in August 1867, passed a *rāzināmā* to the *Māmlatdār* in favour of the defendant Lakshman in the following terms:—

“To Shāmrāv Govind, *Māmlatdār*, on behalf of the Government Tālukā Sinnar.

[This *rāzināmā* is passed] by Bhāguji valad Haibat Halvar, Pātil of Mouje Muldhon. My representation is as follows:—

The land [situated] in the aforesaid *mouje* is in the name of my father Haibati valad Bhāguji Halvar, Pātil. But the person named above is dead. I am his eldest son and heir. I am too poor to cultivate [the same]. Therefore I resign the land. The number of that *tike* (field) [is as follows]:—

Name of the Tike.	[Survey No.]	Acres.	[Assessment] Rupees.
1 Tike Govind Khila ...	64	20	3 12 0

The above land has been resigned from the Christian year 1867-68. Therefore, the Government should take away the [said] land from my name and transfer it to that of Lakshman

1875.
 TARACHAND
 PIRCHAND
 v.
 LAKSHMAN
 BHAVANI.

valad Bhavánji Pavle, Pátíl of the village mentioned above. I and the [other] person mentioned above agreed between ourselves and have made this *moadllá* (transfer). This *rázinámá* for a *moadllá* (transfer) is duly given in writing. The 26th day of the month of August in the Christian year 1867." At the same time Bhágu gave the defendant Lakshman possession of the lands comprised in the *rázinámá*.

Haibati's right in the land was sold in December 1869 at an auction sale at which one Tárúchand was the purchaser. Tárúchand then brought the present suit against Lakshman for recovery of the land with mesne profits. Lakshman contended that the *rázinámá* was a complete abandonment of all the rights of Haibati in the land, and that, consequently, he was himself the absolute owner of the land.

There was no evidence, nor was it contended in argument in either Court, that Haibati had been guilty of any fraudulent concealment of the fact of his being a *Mirásdár*, or that Lakshman was ignorant of that fact; the contrary inference might, however, fairly be drawn from the fact that Lakshman was himself Patil of the village in which were situated the lands comprised in the *rázinámá*. There was no evidence of the consideration paid by Lakshman for the transfer, and the point that there was none, was raised for the first time at the argument of the special appeal, but, as a fact, none had been paid.

The Subordinate Judge passed a decree in favour of the plaintiff; but the Joint Judge reversed his decision and decreed for the defendant.

The special appeal was heard by WEST and NANABHAI HARIDAS, JJ.

Gokaldas Kahandas for *Dhirólál Mathurádás*, Government Pleader, for special appellant:—The *rázinámá* No. 16 does not contain the words "No claim whatever of mine remains in the land," and is not, therefore, a complete relinquishment of the *mirás*. The *Mirásdár* consequently can resume possession of his land within 12 years. What Lakshman acquired by the *rázinámá* was merely a tenancy-at-will, determinable at the *Mirásdár's* pleasure within the period of limitation. There was no consideration for the *rázinámá*.

Ghanasham Nilkanth :—The *rāzināmā* does not contain the words “ No claim whatever of mine remains in the land ”; but is nevertheless a complete abandonment of the grantor’s rights. There is not a word of limitation, or of reservation. Section 42 of the Survey Act I. of 1865 (Bombay) makes the new occupant responsible for the assessment. The exemption of the grantor from the liability to pay assessment and the undertaking of the grantee to pay it constituted the consideration for the *rāzināmā*.

1875.

TARACHAND
PIRCHAND
v.
LAKSHMAN
BHAVANI.

WEST, J.—Haibati’s son Bhāgu, it is clear, passed to the Mām-latdār a *rāzināmā* of the land in dispute in favour of the defendant Lakshman. Tārāchand, as subsequent purchaser of Haibati’s rights, now seeks to eject Lakshman, asserting that, as the land is *mirās*, the resignation by Bhāgu conferred no more than a precarious right of occupation terminable at the will of Haibati or of the successor to Haibati’s interest. It is plain, however, that Bhāgu gave up possession of the land in dispute to Lakshman. Lakshman’s possession is *prima facie* evidence of complete ownership throwing the burden, according to Section 110 of the Indian Evidence Act, of showing that it is held on some inferior title, upon him who seeks to dislodge the possessor. Under the English Common Law “ if the defendant pleads livery and seizin from the plaintiff, the plaintiff cannot reply that the livery was conditional without showing the deed, inasmuch as the plaintiff is estopped to defeat his own livery by a naked averment and parol evidence only ”: 1 Gilb. on Evidence, 86. The creation of a greater interest than a lease of three years, except by a writing, was afterwards prevented by the Statute of Frauds, and hence it comes that the formal delivery of possession does not now in England raise the natural presumption which formally attended it; but the Statute of Frauds is not in operation amongst Hindus at Nāsik, and he who delivers possession there, without evidence of anything more, places himself in such a position that the ordinary presumption operates against him. Under the Hindu law there must, to constitute a complete title, and therefore a complete transfer of title, *bejuris et seisinæ conjunctio* according to Sir T. Strange; but under that law, too, a title may be inferred from possession, so that he who hands over possession gives room for this inference

1875,
TARACHAND
PIPCHAND
v.
LAKSHMAN
BHUVANI.

to arise (1). The nature of the possession granted, or rather of the right in virtue of which the physical detention of the property is transferred, is to be sought in the accompanying agreement, or rather expression of will, on the part of the grantor. Here he hands over possession and gives in a *rāzināmā* in favour of Lakshman, not limited by any qualification whatever. It is argued that the *Mirásdār's* right to resume possession may have been reserved; but to this, if to any case, the maxim applies *expressa nocent; non expressa non nocent*. If Bhāgu intended to reserve any portion of his right, he should have said so. In *Church v. Brown* (2) Lord Eldon said: "The safest rule for property is that a person shall be taken to grant the interest in an estate, which he proposes to convey or the lease he proposes to make; and that nothing which flows out of that interest, as an incident, is to be done away by loose expression, to be construed by facts more loose; that it is upon the party, who has forborne to insert a covenant for his own benefit, to show his title to it." If, being a *Mirásdār* with rights as such, Bhāgu, concealing this circumstance, induced Lakshman to take up the land and relieve him from the burden of the assessment, he was bound to make good the apparent title which he conferred on Lakshman, and so was any one else who came in, like the plaintiff here, by a title created subsequently to the transfer to Lakshman. The transfer to Lakshman, therefore, seems to have been complete, and the rights of Bhāgu wholly extinguished. For these reasons we confirm the decree of the Joint Judge with costs.

Decree confirmed.

(1) 1 Str. H. L. 31; 2 *Id.* 20; 1 Coleb. Dig. 131 CXIII.

(2) 15 Ves. 258. See p. 268.

Note—In *Suryabhan v. Bukajee* (2 Morr. S. D. A., 189) the late Sadr Divāni Adālat held that when a *Mirásdār* abandoned his land, and the Collector made it over to an *Oopree*, such *Oopree* did not, by thirty years' possession, acquire a title against the *Mirásdār* under Regulation V. of 1827, Section 1.—See also *Appa v. Jaghoo* (1 Morr. Sel. Dec. 51). But these cases were overruled in *Salu v. Rajji* (1 Bom. H. C. Rep. 41) in which it was held that the Regulation applied. See also *Arjuna v. Bhavān* (4 Bom. H. C. Rep. A. C. 133) in which it was held that limitation under Act XIV. of 1859 ran against a *Mirásdār* abandoning possession of his land.

In *Joti v. Balu* (reported *infra*) a rule directly opposite to that enunciated in the present case was laid down, viz., that a *Mirásdār* who has given in a *rāzināmā* has a right to recover his land if he sues within the period of limitation, unless in that document it is expressly stipulated that he has abandoned his *mirās* rights.

[APPELLATE CIVIL JURISDICTION.]

Special Appeal No. 190 of 1875.

BÁBÁJI LAKSHMAN AND ANOTHER (DEFENDANTS, APPELLANTS), SPECIAL
 APPELLANTS, v. VÁSUDEV VINÁYAK (PLAINTIFF, RESPONDENT, SPECIAL
 RESPONDENT) 1876
February 1.

Undivided Hindu family—Ancestral estate—Execution—Sale of a co-parcener's interest—Tenancy in common—Partition.

In a suit by a member of an undivided Hindu family to have his right declared to a portion of the joint estate which had been sold by the Civil Court in execution of a decree against his co-parcener alone

Held that the plaintiff should have a decree declaring that he was entitled to joint possession along with the execution purchaser as tenant in common. But that if a division in *specie* were desired, a suit should be brought for that purpose. *Mahabalaya v. Timaya* (12 Bom. H. C. Rep. 138) followed.

THIS was a special appeal from the decision of A. D. Pollen, Assistant Judge of Ratnágiri, in Appeal No. 222 of 1874, confirming the decree of the 1st Class Subordinate Judge at that town.

The plaintiff Vásudev alleged that he and one Náro Shankar were members of an undivided Hindu family, and that, in execution of a decree against Náro alone, a shop forming part of the family estate was attached and subsequently sold by the Civil Court to Bábáji Lakshman; and prayed that his, the plaintiff's right might be declared to a half of the shop, and the purchaser evicted from it. The suit was originally brought against Náro and his creditor Govind; and Bábáji, the purchaser, was subsequently joined as a co-defendant.

Náro did not appear to defend the suit.

The other defendants denied the plaintiff's union with Náro, and set up other pleas, which it is unnecessary to notice.

The Subordinate Judge found the plaintiff and Náro to be united, and passed a decree in favour of the plaintiff. The Assistant Judge confirmed his decree, refusing to give effect to a partition deed (Exhibit No. 34) set up by the defendants.

The special appeal was heard by WEST and NANABHAI HARIDAS, JJ.

1876.
 BABAJI
 LAKSHMAN
 AND ANOTHER
 v
 VASUDEV
 VINAYAK.

Shántárám Náyán for the defendants.—The shop is the defendant Náro's sole property, as evidenced by Exhibit No. 34, which purports to be a complete partition between the plaintiff and Náro, and yet makes no mention of this shop. It is inconsistent with it that the plaintiff should have a right as united in interest with Náro. The purchaser cannot, even if the plaintiff and Náro be found to be united, be summarily evicted. As held in *Máhábáláyá v. Timáyá* (1) the plaintiff is entitled to possession as tenant in common with Náro's vendee, Bábáji.

Mánekshá Jehángirshá for the plaintiff.—The finding of the Appellate Court, that this plaintiff and Náro are united, is final. The plaintiff is, therefore, entitled to his share in the shop, which there is evidence to show is in Bábáji's possession.

Shántárám in reply.

The judgment of the Court was delivered by

WEST, J.—In this case, a shop having been attached as the sole property of Náro, and afterwards sold as his to Bábáji; Vásudev, who had failed in an attempt to raise the attachment under Section 246 of the Civil Procedure Code, sued to establish his right to a moiety of the shop as his ancestral property. In the Court of first instance the contest appears to have been chiefly on the ground of whether, in virtue of a partition evidenced by document No. 34, the plaintiff Vásudev was entitled to a portion of the shop, his title to which the Subordinate Judge affirmed. In regular appeal the Assistant Judge shut out the document No. 34 as unstamped, and on the remaining evidence he found that the plaintiff was united in interest with Náro. But on this view of the facts he affirmed the decision of the Subordinate Judge.

It appears to us that this case is substantially identical in principle with *Máhábáláyá v. Timáyá* (1) and that, for the reasons there set forth, the plaintiff Vásudev, having been found to be united in interest with Náro, was entitled to recover or to retain possession as tenant in common with Náro's vendee,—that is, with Bábáji. The latter is sued as in possession, but the posses-

(1) 12 Bom. H. C. Rep., 138.

sion, by notice to the tenant (No. 37), given to Bábáji as execution purchaser, by the Court, was not meant to deprive Vásudev's suit, in the event of its establishing his right, of any of its efficacy through a temporary defect of possession, while the rights of the parties had still to be brought to final adjudication. Although Vásudev's tenant received a notice not to pay rent to him, this constructive dispossession of Vásudev should not place him at any disadvantage when he had once established that it ought not to have occurred or ought to have been materially qualified. On the other hand, we think that the question of whether the debt, for which Náro's interest was sold, was one binding on the whole of the joint property, is one that we cannot at this stage entertain, as it was not raised in the Courts below.

We shall modify the decree of the District Court by declaring Vásudev entitled to joint possession along with Bábáji as tenant in common. The relative proportions of their interests, if a division *in specie* be desired, must be determined in a suit to ascertain Náro's share.

Each party to bear his own costs throughout.

Decree accordingly.

Note.—For the converse of this case see *Pandurang v. Bhaslar* (11 Bom. H. C. Rep. 72), which was a suit in ejectment by a purchaser at an execution sale against an undivided member of a mortgagor's family in possession of the mortgaged lands, and the cases referred to in the note at the end of that report.

[APPELLATE CIVIL JURISDICTION.]

RA'HI, WIFE OF TEJA' KURAD, AND OTHERS (DEFENDANTS AND APPELLANTS)
v. GOVINDA' VALAD TEJA' (PLAINTIFF AND RESPONDENT.)

1875.
September 7.

Hindu law—Effect of illegitimacy on the right of succession—Dāsiputra—Pāt marriage or remarriage amongst Sūtras.

The general result of the authorities, both juridical and forensic, is that among the three regenerate classes of Hindus, (Brahmans, Kshatriyas, and Vaashyas,) illegitimate children are entitled to maintenance, but cannot inherit, unless there be local usage to the contrary; and that, among the Sudra class, illegitimate children, in certain cases at least, do inherit. The extent to which this right exists, considered, and the texts of Hindu law books bearing on the point referred to.

1876.

BA'BA'JI
LAKSHMIN
AND ANOTHER
v.
VA'SUDEV
VINAYAK.

1875.

RA'HI AND
OTHERS
v.
(GOVIND
VALAB TAJA)

According to Vijnyāneshvara, the author of the *Mitākshara* (Chap I., Section 12), the father of an illegitimate son by a *Dāsi* among Sudras may in his (the father's) life-time allot to such son a share equal to that of a legitimate son, and, if the father die without making such allotment, the illegitimate son by the *Dāsi* is entitled to half the share of a legitimate son, and, if there be no legitimate son and no legitimate daughter or son or such a daughter, the illegitimate son by the *Dāsi* takes the whole estate. If, however, there be a legitimate daughter or legitimate son of such a daughter, the illegitimate son would take only half the share of a legitimate son, and such daughter or daughter's son would take the residue of the property, subject to the charge of maintaining the widow of the deceased proprietor.

The *dictum* of Lord Cairns in *Sri Gajapathi Radhika v. Sri Gajapathi Nilamani* (13 Moore Ind. App. 497; S. C. 6 Beng. L. R. 202; 14 Calc. W. R. P. C. 33, reversing 2 Mad. H. C. Rep. 369),—"Supposing the sons, or either of them, to have been legitimate, the widow (of Padmanabha) could have been entitled to maintenance only. Had both the sons been illegitimate, their claim, unless some special custom governed the case, (which is not in proof,) would have been to maintenance only. In this last-named case the widow would have had the ordinary estate of a Hindu widow"—commented upon and explained.

The terms *Dāsi* and *Dāsiputra*, as defined by various writers on Hindu law, discussed, and the rights by inheritance of a *Dāsiputra* considered.

The condition that, in order to entitle the illegitimate offspring of a Sudra woman by a Sudra to inherit the property of the latter, or a share in it, she should, according to Jimuta Vahana and Nilkantha, be an unmarried woman, has, in practice, been discarded in the Presidency of Bombay.

In this Presidency the illegitimate offspring of a kept woman, or continuous concubine, amongst Sudras, are on the same level as to inheritance as the issue of a female slave by a Sudra.

The custom of *Pāt* marriage among the Marāṭhas, and *Nātrā* amongst the inhabitants of Guzerāt, referred to, and the authorities bearing on the subject considered and discussed.

The sons of a *Punarbhū* (twice-married woman) by a duly-contracted *Pāt* marriage, *i.e.*, in accordance with the custom of the caste, are legitimate and, as to the right of inheritance and extent of shares, rank on a par with the sons by *lagna* marriage.

G, a Sudra woman, was married to T (also a Sudra) by *Pāt* marriage, without having received a *chhor chūi* (release) from her first husband, who was then living, or obtained any other sanction of her *Pāt* with T :—

Held that the intercourse between G and T was adulterous, and that, therefore, the plaintiff, their son, being the result of such intercourse, was not entitled to take as *heir* even to the extent of half a share, and was not a *Dāsiputra* within the scope of Yajnyavalkya's text, or recognized as such by other commentators. He was, however, held entitled to maintenance, as he had been recognized by T as his son.

THIS was a special appeal from the decision of C. B. Izon, Acting Joint Judge at Tanna, reversing the decree of Váman Ganesh Bakhle, Subordinate Judge at Sinnar.

1875.

RÁHI AND
OTHERS
v.
GOVIND
VALAD TEJÁ.

The facts of the case were as follows :—Tejá Kurad died in 1866, leaving, surviving him, the defendants (special appellants) Ráhi his widow, and Dhondi and Sakhu, his daughters. The fourth and fifth defendants, Mahádyá and Phulchand, were distant male relations of Tejá Kurad. The plaintiff Govindá claimed, as his son and heir by Gau, an alleged wife of Tejá by the *Pát* ceremony, to be entitled to certain lands. Tejá died without leaving any male issue other than Govindá. Previously to her connection with Tejá, Gau had been, by *lagna*, the wife of Bhágu, from whom she separated herself and went to live with Tejá for some time, during which Govind was born to her. Tejá believed Govindá to be, and treated him as, his son. The defendant Ráhi, Tejá's *lagna* wife, and the husband of Tejá's daughters (the second and third defendants) and defendant Mahádyá had also described and treated Govindá as the son of Tejá.

The Subordinate Judge found that Govindá was not the son of Tejá, either legitimate or illegitimate, and dismissed his suit with costs.

The Joint Judge (Mr. Izon) reversed the decree of the Subordinate Judge, and made a decree for the plaintiff with costs against the four first defendants. He found, as a fact, that there had been a ceremony of marriage solemnized between Tejá and Gau, but that it was invalid, inasmuch as Bhágu, the husband of Gau by *lagna*, was then living, and there was not any sufficient evidence that he had divorced her. He further found that Govindá was the illegitimate son of Tejá and, being a Sudra, was, in default of a legitimate son, his heir.

The case was argued before WESTROFF, C.J., and LARRENT, J., on the 5th July 1875.

Gokuláás (for Dhirájlál Mathurááás, Government Pleader) for the appellants.—Plaintiff's mother, Gau, had been lawfully married to Bhágu. There is nothing to show that Gau and her husband

1875. Bhāgn had no access to each other, while Gau lived with Tejā as his wife by *Pāt* marriage.

RA'HI AND OTHERS
GOVIND VALAD TEJA'. [WESTROP, C.J.:—Do you wish to have an issue on that question ?]

Such issue is unnecessary, as it has been found by the lower Courts that Gau's marriage with Bhāgn had not been dissolved at the time of her alleged *Pāt* with Tejā. A woman who remarries in the life-time of her first husband cannot be regarded as the lawful wife of her second husband: *Khunkar v. Umāshankar* (1). No custom can render such second marriage legal and valid: *Reg. v. Karsan Gaja* (2). Tejā's intercourse with Gau, therefore, was adulterous. Plaintiff, consequently, as the result of such intercourse, could not be considered as an illegitimate son of Tejā, who would be entitled to inherit his (Tejā's) property under the Hindu law, in preference to Tejā's widow and daughters or their offspring. The expression "illegitimate sons" used by Strange, Macnaghten, and some other writers on Hindu law is rather misleading. The "illegitimate sons" who are entitled to inherit by Hindu law among the Sudras are sons of slaves (*Dāsiputra*), expressly mentioned in that law. A *Dāsiputra*, according to the writers on Hindu law, is "the son of a female slave". No more extended meaning should be given to that term. Plaintiff is not a *Dāsiputra* within the meaning of that definition. His mother, Gau, was not the *Dāsi* (a female slave) of Tejā, whose property plaintiff now seeks to recover. The subject has been fully discussed in *Parisi Nayudu v. Bangaru Nayudu* (3). According to that case, to entitle the illegitimate sons of a Sudra by a Sudra woman to inherit a share in the family property, the woman must have been unmarried. The learned pleader also referred to Vyav. May. Ch. IV, Sec. 4, pl. 32 (Sto. H. L. Bks. 55); Mit., Ch. I., Sec. 12, pl. 2 (Sto. H. L. Bks. p. 426); I. West and Bühler, pp. 47, 48; Steele on Hindu Law and Customs, pp. 41, 179.

Shāntārām Nārāyan for the respondent.—The objection that plaintiff is not entitled to inherit, on the ground that he is not

(1) 10 Bom. H. C. Rep. 381. (2) 2 Bom. H. C. Rep. 117.
(3) 4 Mad. H. C. Rep. 204.

Tejá's illegitimate son by a slave or *Dási*, was never taken in the Courts below. Moreover, the meaning of the word *Dási*, as given by Professor Wilson in his Sanskrit and English Dictionary, is sufficiently large to include a woman of Gau's position in the present case, and to entitle her son to succeed to Tejá's property. The cases mentioned by Messrs. West and Buhler at pages 53, 56, 57, and 59 of the first volume of their work support plaintiff's claim.

1875.
RA'HI AND
OHLERS
v.
GOVIND
VALAD TIJA'.

The judgment of the Court was delivered by

WESTROPP, C.J., who having stated the facts proceeded as follows :—

The findings of fact of the Joint Judge are, in special appeal, binding on this Court. Tejá Kurad, Gau, and all of the parties to this suit, are admitted to belong to the Sudra tribe, and it has not been denied that their caste is one in which the custom of remarriage prevails. The pleader for the special appellants at first contended that non-access of Bhágu to Gau was not found as a fact, but when offered by this Court an issue on the question of access or non-access, declined it, and abandoned that point. He contended, however, that as the *Pát* marriage was void, inasmuch as Gau had not been divorced from Bhágu, who was still living, the plaintiff must be regarded as the result of an adulterous intercourse, and, therefore, could not be deemed such an illegitimate child as might, by the Hindu law applicable to Sudras, succeed to the estate of his putative father. Whether, under such circumstances, the plaintiff is entitled, as illegitimate son of Tejá Navsáji, to succeed to the land in dispute, is the main question now before us.

In the arguments upon that question, the scope of the term *Dásiputra*, frequently employed by Hindu jurists who have treated of the rights of illegitimate offspring, has been much discussed. Translators of those authors have usually rendered that term as "the son of a female slave"; and for the special appellants it has been contended that *Dásiputra* cannot be accepted as having any more extended signification. Whether it can be so limited, we shall proceed to consider after we have referred to those passages in the Sanskrit works of chief importance in this Presidency which touch the rights of illegitimates, first, however,

1875. premising, as the general result of the authorities both juridical
 RA'HI AND and forensic, that amongst the three regenerate classes of Hin-
 OTHERS dus, (Brahmans, Kshatriyas and Vaisyas,) illegitimate children
 GOVIND are entitled to maintenance; but, unless there be local usage to
 VATAD TEJA', the contrary, cannot inherit (1), and that amongst the Sudra
 class, illegitimate children, in certain cases at least, do inherit (2).
 The extent to which this right exists we shall presently consider.

The Smṛiti writer Yājñavalkya says: "A son begotten by
 a man of the servile class on his female slave, may receive a share
 by his father's choice; or, after the death of the father, the broth-
 er shall allot him half a share (3). Should he have no brother,
 he shall take the whole, unless there be a daughter's son" (4).

It will be observed that, in the concluding exception in that text,
 Yājñavalkya mentions only the daughter's son, and omits the
 widow and the daughter, both of whom, in the ordinary course
 of succession amongst legitimates, rank before the daughter's
 son. The most probable explanation of this omission is that
 Yājñavalkya, by the daughter's son (*putrika putra*), meant the
 appointed daughter's son—the phrase *putrika putra*, though
 literally meaning daughter's son, yet technically denoting the
 appointed daughter's son (5). In the days of Yājñavalkya and
 Manu the son of an appointed daughter ranked next in succe-
 sion to the Aurasa (legitimate born son) (6). Since, however, the
 commencement of the *Kālī-Yug* the filiation of any but a son
 legally begotten or given in adoption by his parents is prohibi-

(1) Manu, Ch. IX, pl. 155; 3 Dig. Bk. V, Ch. 3, pl. CLXVI, CLXXVII;
 7 Moore Ind. App. 18; 1 Stra. H. L. 61-70-71 187; 2 *Ibid.* 70 71; Daya Vibhāga
 (Burnell's translation) p. 25, pl. 33; 1. West and Bühler, 47, Q. 2; 1 S. D. A.
 (Calc.) Rep. 28 (*Mohun Sing v. Chuman Rao*) 3 *Ibid.* 132 (*Prishad Sing v. Rance
 Mulesree*).

(2) 1 Stra. H. L. 69-70 173; 3 Dig. Bk. V, Ch. III, pl. CLXXIV. to pl. CLXXVI;
 Elberling, pl. 160; 1 Macn. H. L. 18; 2 *Ibid.* 15 16 n; Manu, Ch. IX, pl. 179;
 Daya Vibhāga (Burnell) p. 17, pl. 24; 1. West and Bühler, 47—Q. 1, 48—Q. 3, *et seq.*

(3) 3 Dig. Bk. V, Ch. III, pl. CLXXIV.

(4) *Ibid.* pl. CLXXV. Acc. Vivada Chintamani 274, 275 (Tagore's translation).

(5) Mitāk., Ch. I, Sec. XI, pl. 3.

(6) 3 Dig. Bk. V, Ch. 4, S. 2, pl. CC, CCI, CCII, to CCXIII, CCXV, CCXVI,
 CCXX, to CCXXII; Manu, Ch. IX, pl. 127 to 140; Mitāk., Ch. I, Sec. XI,

ed (1). * Vijnānesvara in the Mitākshara, which is of great authority in this Presidency, in commenting on the above text of Yajnyāvalkya, would, in the passages which we are about to quote, appear to have given to *putrika putri* its literal signification of "any daughter's son" rather than its technical value "appointed daughter's son", and thus to have expanded Yajnyāvalkya's text by bringing daughter's sons at large, as distinguished from the more limited category of appointed daughter's sons, into competition with such illegitimate sons of the last owner as may fall within the scope of the term *Dāsiputra*. The word used in Yajnyāvalkya's text, which, in the translation by Colebrooke, has been rendered "female slave", is *Dāsi*. The 12th Section of the 1st Chapter of Colebrooke's translation of the Mitākshara, pages 322, 323, which contains the commentary of Vijnānesvara, to which we have referred, is as follows :—

1875.
RA'HI AND
OTHERS
o.
GOVIND
VALAD 'T'JA'.

"1. The author (Yajnyāvalkya) next delivered a special rule concerning the partition of a Sudra's goods. 'Even a son, begotten by a Sudra on a female slave, may take a share by the father's choice. [*Jatopi dasyam* (*i. e.*, on a *Dāsi*) *Sudrena Kamaptonsaharo bhavet*]. But, if the father be dead, the brethren should make him partaker of the moiety of a share : and one, who has no brothers, may inherit the whole property, in default of daughter's sons' (2)".

"2. The son, begotten by a Sudra on a female slave [*Sudrena dasyam* (*i. e.*, on a *Dāsi*) *samut-pannah putrah*] obtains a share by the father's choice, or at his pleasure. But after [the demise of] (3) the father, if there be sons of a wedded wife, let these brothers allow the son of the female slave (*Dāsiputra*) to participate for half a share ; that is, let them give him half [as much as is the amount of one brother's] (4) allotment. However, should there be no sons of a wedded wife, the son of a female slave [*Dāsiputra*] takes the whole estate, provided there be no

(1) 3 Dig. Bk. V, Ch. IV, S. 8, pl. CCLXXIX, CCLXXX ; general note to translation of Manu, p. 431 ; Vyav. Mayuka, Ch. IV, Sec. IV, pl. 46 ; Datt. Mimansa, S. 1, pl. 64 ; 10 Bom. H. C. Rep 268, 275 ; Smṛti Chāndika Ch. X, pl. 5, 6, 7, p. 142.

(2) Yajnyāvalkya.

(3) Balam Bhatta.

(4) The Subodhini and Balam Bhatta.

1875. daughter of a wife nor sons of daughters. But if there be such, the son of the female slave (*Dāsiputra*) participates for half a share only.”

RA'HI AND OTHERS
vs.
GOVIND VALADTEMA'.

“ 3. From the mention of a Sudra in this place [it follows that] the son begotten by a man of a regenerate tribe on a female slave [*dejjatinn dasyam* (i.e., on a *Dāsi*) *ulpanamh*] does not obtain a share even by the father's choice, nor the whole estate after his demise. But, if he be docile, he receives a simple maintenance.”

The result of the foregoing commentary appears to us to be that Vijnyānesvara holds that, amongst Sudras, the father of an illegitimate son by a *Dāsi* may in his (the father's) life-time allot to such son a share equal to that of a legitimate son; and, if the father die without making such an allotment, the illegitimate son by the *Dāsi* is entitled to half of the share of a legitimate son; and, if there be no legitimate son, and no legitimate daughter or son of such a daughter, the illegitimate son by the *Dāsi* takes the whole estate. If, however, there be a legitimate daughter or legitimate son of such a daughter, the illegitimate son would take only half the share of a legitimate son; and such daughter or daughter's son would take the residue of the property, subject, of course, to the charge of maintaining the widow of the deceased proprietor. The cases, (with perhaps two exceptions,) in this Presidency, mentioned by Messrs. West and Bühler, and our own experience lead us, without hesitation, to the conclusion, that the law has here been administered in accordance with what has been just stated as the doctrine expressed or implied by Vijnyānesvara in the *Mitākshara*. He is silent as to the widow, who, in the ordinary course of succession, would come before either the daughter or the daughter's son. The position should be noted of the passages, which we have quoted from his work in that portion of it which treats of the rights of sons at large to inherit, and the prelude to that which immediately follows, viz:—

“That sons, principal and secondary, take the heritage, has been shown. The order of succession among all (tribes and classes) on failure of them, is next declared” (1). He then proceeds to treat of the rights of the wife, daughters, parents, brothers, &c. The

(1) Colebrooke's translation of the *Mitāk*, Ch. II, S. 1, pl. 1.

preference of the daughters and sons of daughters, in the case of Sudras, to illegitimate sons, and the omission to mention or give precedence to the widow in the case of such sons, appear to be the result of arbitrary arrangement rather than of logical sequence or consistency with the general scheme of inheritance. Such an arrangement is one of numerous disturbances of that general scheme: for instance, Vijnyānesvara's preference of the paternal grand-mother to the paternal grand-father (1). A note to Dr. Muir's Sanskrit Texts, Vol. II, pages 170, 171, taken from Roth, indicates the source of these deviations: "Vedic interpretation could impose on itself no greater obstruction than to imagine that the Indian commentators were infallible, or that they had inherited traditions which were of any value. Even a superficial examination shows that their plan of interpretation is the very opposite of traditional; that it is really a grammatical and etymological one, which only agrees with the former method in the erroneous system of explaining every verse, every line, every word by itself, without inquiring if the results so obtained harmonise with those obtained from other quarters," &c. Jimuta Vahana, in a passage in the Daya Bhāga (Ch. IX., pl. 31), gives to the son of a Sudra by an unmarried woman the whole property if there be no legitimate son and no daughter's son, and, if there be a daughter's son, permits the son by an unmarried woman to share equally with the daughter's son, assigning a reason for this disposition, which proves that he too departed from the more strict and technical signification of *putrika putra*, viz., son of an appointed daughter, and used the term in its ordinary literal signification of son of any daughter, whether appointed or not. That reason is,—"it is fit that the allotment should be equal; since the one, though born of an unmarried woman, is the son of the owner; and the other, though sprung from a married woman, is only his daughter's son". Devanda Bhatta, whose authority prevails more in the southern part of the peninsula than in this Presidency, interprets the term daughter's son (*putrika putra*) occurring in the text of Yajnyāvalkya commented on, as above mentioned, in the Mitākshara, as including the wife and daughters, and as permitting them to share equally with the illegitimate son by a *Dāsi* (2).

1875
RATHI AND
OTHERS
2.
GOVIND
VALAB 'TWA'.

(1) Colebrooke's translation of the Mitāk., Ch. II, S. V., pl. 1, 2, 3.

1875.
RA'HI AND
OTHERS
v.
GOVIND
VALAD TEJA.

The *obiter dictum* of the shastri, in favour of a widow if there had been one, in his reply to Question 12 at page 56 of I. West and Bühler, and the opinion of the shastri in favour of equality of shares between the daughter and son in his reply to Question 17 at page 60 ; and also the reply of the shastri to Question 1, Section 5, at page 63, where he assigns one-half to the daughter and one-half to the son of an illegitimate son, may have been suggested by the views of Devanda Bhatta and Jimuta Vahana, although they do not refer to those authors. The *obiter dictum*, in reply to Question 12, is, in the remark of Messrs. West and Bühler (page 57), rightly denied to be law amongst Sudras in this Presidency. They say : "The illegitimate son would inherit the whole estate of his father, even though a widow of the latter be living"; and their remark, at page 63, to the effect that the son of the illegitimate son takes only the latter's half share, rightly denies the equality of shares assigned to him and the daughter by the shastri. Those observations of Messrs. West and Bühler are certainly in accordance with the Mitákshara. The exclusion of the *Muhatar* widow (a widow who has been twice married), is also supported by the case embodied in Question 8, and the shastri's reply thereto at page 53 of I. West and Bühler. The Vyavahara Mayukha (by Nilakanthá), the other leading authority here, contains, as regards the respective rights, amongst Sudras, of the widow and illegitimate sons, nothing inconsistent with the Mitákshara; and not only makes no reservation in her favour, but is silent also as to daughters and their sons. Placitum 28 of Chap. IV, Sec. 4, in quoting Devala as to sons of a Sudra woman by a man of equal class, probably applies to legitimate sons only. In plac. 32 alone does he distinctly deal with the rights of the illegitimate sons of a Sudra woman by a man of equal class, and there merely with reference to their rights as against legitimate sons, and not with reference to daughters or their sons. His silence, however, as to the latter, cannot be regarded as implying any contradiction of the Mitákshara. He was manifestly only partially treating of the subject of illegitimate children amongst Sudras, and, in fact, touching upon it very lightly. Where Nilakanthá does not expressly or by direct implication contradict the Mitákshara, our safest course in this Presidency is generally, we will not say universally, to follow it.

We now proceed to refer to a *dictum* of Lord Cairns in *Sri Gajapathi Rudhika Patta v. Sri Gajapathi Nilamani Patta Maha Devi*, and another appeal consolidated with it (1). The decision, however, solely turned upon the construction of documents containing certain terms of compromise. The remarks of Lord Cairns, at page 512 of the report by Mr. Moore and throughout it, show this to have been so. The *dictum*, to which we refer, was, therefore, extra-judicial. Any expression, however, of the opinions of their Lordships of the Privy Council necessarily carries with it great weight. It is at page 506, where, in giving the judgment of the Privy Council, and while speaking of what would have been the rights of the sons of Padmanabha, if there had not been any compromise, his Lordship is reported as having said :—

1875.

RAJAH AND
OTHERS
D.
GOVIND
VATAD TEJA'.

“Supposing the sons, or either of them, to have been legitimate, the widow (of Padmanabha) could have been entitled to maintenance only. Had both the sons been illegitimate, their claim, unless some special custom governed the case (which is not in proof), would have been to maintenance only. In this last-named case the widow would have had the ordinary estate of a Hindu widow.” The marginal note to the report is erroneous, clearly referring to Padmanabha under the letter A, it describes him as “a Hindu, either without caste or of the Sudra class”. But their Lordships of the Privy Council did not announce that they had come to any such conclusion, and, so far as we can perceive, there was not any allegation in the pleadings that Padmanabha was a Sudra or below a Sudra. There was, however, in the pleadings on one side an assertion that Gopinadha, one of his sons, and Gopinadha's son, the appellant, were outcastes or at best of the Sudra class (page 499). The Civil Judge, however, found Gopinadha to be of the Kshatriya class (page 500). The High Court of Madras held his father Padmanabha to be a Rajput by caste which they deemed to be a mixed class between the second (Kshatriya) and the third (Vaisya) of the regenerate classes, and that the mother of Gopinadha was a concubine of Padmanabha and a woman of the Karnam caste, and, as such, they regarded her as, at least, a Vaisya, and perhaps more pro-

(1) 13 Moore Ind. App. 497; S. C. 6 Beng. L. R. 202; 14 Calc. W. R. P. C. 33, reversing 2 Mad. H. C. Ren. 369.

1875.
RA'HI AND
OTHERS
v.
GOVIND
VALAD TELAV.

bably a woman of a mixed caste, inferior to the second (Kshatriya), but superior to the third (Vaisya) of the regenerate classes. The High Court accordingly came to the conclusion that Gopinadha, being the illegitimate son of Padmanabha, whom it held to be one of the mixed classes between the second and the third of the regenerate classes, could not succeed imply a heir of Padmanabha (1), although it was of opinion that under the compromise he (Gopinadha) and Krishnachandra, another son of Padmanabha, whose legitimacy was also disputed, were entitled to succeed to the property of Padmanabha. It is unnecessary, for the purpose of considering the above *dictum* of Lord Cairns, to enter more deeply into the facts of those appeals. If Padmanabha were a Sudra, as stated in the head note to Mr. Moore's report, no school of Hindu law would, on account of illegitimacy (uncomplicated by the stain of adultery or incest), have wholly excluded his sons from inheriting. On the supposition, then, that Padmanabha was a Sudra, that part of the *dictum* of Lord Cairns, in which he says that, had both of Padmanabha's sons been illegitimate, they would have been entitled to maintenance only, could not be reconciled with any school of Hindu law. We have already referred to the doctrines of the Benares, Maharashtra, Dravida and Bengal schools as represented by the Mitākshara, Mayukha, Dattaka Chandrika, and Daya Bhāga, respectively. That of the Mithila school will be found at pages 271, 273, of the Vivada Chintamani (Tagore's translation). We think, however, that, when so speaking, Lord Cairns must have been regarding the status of those sons from the same point of view as that of the Madras High Court, which pronounced them to be the illegitimate sons of a Rajput, *i. e.*, of a man of mixed caste between the second and third regenerate classes, and, therefore, above the degree of a Sudra. This would completely reconcile his Lordship's *dictum* with the Hindu law (2).

We now revert to the question as to the force of the term *Dāsiputra*. The masculine noun *Dās* or *Dāsa* is, by Professor H. H. Wilson in his Sanskrit and English Dictionary published at Calcutta in 1819, explained as "a fisherman, a servant, a slave, a Sudra, or man of the fourth tribe." He further says that it is

(1) 2 Mad. H. C. Rep. 373, 374.

(2) See 7 Moore Ind. App. 18.

(as is well known here) used as an affix to the names of Sudras, and adds that it is occasionally employed to indicate "a person to whom it is proper to make gifts" and "a sage—one to whom the proper nature of the soul is known". The feminine, *Dāsi*, he describes as "a female servant or slave, the wife of a slave or a Sudra." Professor Monier Williams, in his Sanskrit and English Dictionary, published at Oxford in 1872, describes *Dāsa* as "a fisherman, a boatman", and *Dāsi* as "a female servant or slave, servant-maid, whore, harlot". Mr. Bunnell, in the introduction to his translation of the *Daya Vibhāga* of Madhaviya (p. XIV. and note), says that, in Southern India, the word *Dāsi* signifies also a female dancer attached to a temple (1). And Devanda Bhatta, in the *Smṛiti Chandrika*, Ch. XI., S. 1, pl. 10, 11, in speaking of a wife married in the Asura form, observes: "That woman, who has been purchased for value paid, is not styled a *Patni*; she associates neither in rites relating to deities nor in rites relating to the manes. The learned call her a *Dāsi*." The affinity between slavery and the condition of a Sudra is illustrated by a text from Manu in the second volume of the Digest, Book III, Ch. 1, S. 2, pl. XXXVI:—"A Sudra, though emancipated by his master, is not released from a state of servitude; for, of a state which is natural to him, by whom can he be divested?" Cullaica Bhatta's comment upon that text (*Ibid.*) is:—"Emancipated by him to whom he had become a slave by capture in war or the like, a Sudra is not released from a state of servitude to Brahmanas, since servitude is natural to him, who can divest him of a state of slavery proper to the servile class? Hence it is necessary that obedience be paid by a Sudra to a Brahmana or twice-born man. This is intended: else the subsequent enumeration of slaves would be nugatory."

Mr. Colbrooke (2) remarks that "issue by a concubine" (by which we understand him to mean *Dāsiputra*) "is described in the law as a son by a female slave or by a Sudra woman. If the father were a Sudra, he might have allotted a share to his illegitimate son"; and for this he cites the passages in the *Mitākshara*, above quoted, which circumstance shows that, although

(1) See 12 Moore Ind. App. 203 to the same effect.

(2) 2 Strange H. L., p. 68.

1875.
RA'HI AND
OTHERS
V.
GOVIND
VALAD TLJA'.

1873. Mr. Colebrooke, in his translation of them, rendered the term *Dāsi* a female slave, he understood it to include a Sudra woman. And the commentator (Jagannatha) upon pl. (CLXXIV. (the text of Yajnyavalkya) in Colebrooke's translation of the Digest, Vol. III, Bk. V. Ch. III., page 113 of the edition of 1801 referring to Jimuta Vahana (presently to be again mentioned), says:—
 “The son of a Sudra by a female slave or other Sudra woman not lawfully married, shall, with his father's consent, have an equal share with other sons.” Vachespatis Misra (1), purporting to quote Yajnyavalkya, says:—“A son of a Sudra by an unmarried woman may receive a share by the permission of his father; but, if the father be dead, he shall receive half of the share of his brothers who are born by married wives. Should he have no brother, he shall take the whole, unless there be a daughter's son.” In the note, at pages 15 and 16 of Sir William Macnaghten's Hindu Law, that author gives it as his opinion that, “if the woman were not his (the putative father's) female slave, the son begotten on her by him would have no right to the inheritance, but only a claim to maintenance.” For that remark he has not given any reference; and, although in Bengal he deservedly enjoys a high reputation as a writer on Hindu law, his opinion, so far as it denies the right of inheritance to the son of a Sudra by a concubine, who is not a female slave, is at variance, not only with that of authors whom we have already quoted, but also with the Daya Bhāga, the leading treatise on the law of inheritance amongst Hindus in Bengal, at Chap. X, pl. 29, of which the author, Jimuta Vahana, is, in Colebrooke's translation, represented as saying:—“But the son of a Sudra by a female slave, or other unmarried Sudra woman [*Sudrasya aparivita dasyāli Sudraputra*], i.e., literally, ‘the son (born) to a Sudra by an unmarried *Dāsi* or other Sudra’ [female] may share equally with other sons by consent of the father.” For this he cites Manu, Ch. IX, pl. 179. And in pl. 30 he says that “without such consent he shall take half a share”; and in pl. 31, already above referred to, he continues thus:—“Begotten on an unmarried woman, and having no brother, he may take the whole property: provided there be not a daughter's son.” So Yajnyavalkya ordains: ‘one who has no brothers may
 (1) Vyāsa Chintāmani, p. 274, translated by Prasanno Coomars Tagore.

inherit the whole property for want of daughter's sons.' But, if there be a daughter's son, he shall share equally with him : for no special provision occurs : and it is fit that the allotment should be equal ; since the one, though born of an unmarried woman, is son of the owner ; and the other, though sprung from a married woman, is only his daughter's son." In support of these latter placita he cites the texts of Yajnyávalkya already set forth in the quotations which we have made from the Mitákshara. These three placita 29, 30 and 31 in the Daya Bhāga show that Jimuta Vahana understood the term *Dāsi* in a wide sense, including, speaking generally, any unmarried Sudra woman kept for the purpose of concubinage ; for Manu (Ch. IX, pl. 179) speaks only of the *Dāsi* of the putative father, or of the *Dāsi* of his *Dās* or *Dāsa* (*Dāsa-Dāsi* or, in the locative case, *Dāsa-Dāsyaṃ*), explained by Chudāmani as the wife of the putative father's male slave, and by Srikrishna as the unespoused concubine of his male slave (see Colebrooke's translation of the Daya Bhāga, page 151, *in notis*), and Yajnyávalkya uses only the term *Dasyam* (on a *Dāsi*), or *Dāsīputra* (son of a *Dāsi*).

1875.
RATH AND
OTHERS
v.
GOVIND
VALAD TEJ A'.

Sir William Macnaghten's opinion would appear to rest on the limited view of the scope of the term *Dāsi*, which the High Court of Madras seemed disposed to repudiate (1). Maintenance only was sought in that case, and was granted, though opposed on the ground that the plaintiff was not the son of a female slave but was the son of a zamindar (a Sudra) by a concubine. Mr. Mayne, for the defendant, had there argued that the plaintiff, being the son of a Sudra, might be entitled to inherit, although illegitimate, but was not entitled to maintenance. If it be true that the son of a Sudra by a female slave may inherit, but that the son of a concubine, who is free, cannot do so, an absurd consequence would seem to follow. It is laid down by Katyayana (2 Dig., Bk. III, S. 2, pl. 49) that, "if a man approach his own female slave, and she bear him a son, she must, in consideration of her progeny, be enfranchised with her child"—which rule, Jagannatha, the commentator, referring to other authorities, says "is applicable if her master have no legitimate or adopted son, for in that case she need not be enfranchised." Assuming

(1) 2 Mad. H. C. Rep. 293-295.

1875.
RIGHT AND
OBLIGES
A
HINDU
VALAD TILAK.

that, under such circumstances, the Sudra father of the illegitimate son emancipates the female slave, and she, subsequently when free, bears to him another son—the former illegitimate son would inherit and the latter illegitimate son, though by the same father and mother, would not, if Sir W. Macnaghten's doctrine be correct.

Nilakanthā, in the Vyavahara Mayukha, Chap. IV, S. 1, pl. 28, quoting Devala, says.—“The son begotten on a Sudra woman by any man of a twice-born class is not entitled to a share of land: but one begotten on her, being of equal class, shall take all the property (whether land or chattels): thus is the law settled.” *Of land* acquired by purchase and the other modes also. Yet he does obtain a share of the moveable wealth.” That passage, as already observed, refers to Sudra women who are married. He next refers to Sudra women, who are not married, thus:—

“29. But the son by a Sudra woman, not legally married, does not obtain a share, even of the moveable property.” (If he stopped here, we might suppose that he was speaking of the son of a Sudra woman by a man of her own class, but the sequel shows that he was speaking only of the son of a Sudra woman by a man of one of the twice-born classes.) He continues:—“And Manu: ‘The son of a Brahman, a Kshatriya, or a Vaishya, by a woman of the servile class, shall inherit no part of the estate [unless he be virtuous; nor jointly with other sons unless his mother was lawfully married:] whatever his father may give him, let that be his own’” A previous passage (pl. 27 quoted by Nilakanthā from Yajnyavalkya) (1) contemplated the possession by a Brahman of wives of the four tribes, including the Sudra; by a Kshatriya of three, including the Sudra; and by a Vaishya of two including the Sudra—a luxury, however, forbidden to the twice-born classes since the *Kali-yug* commenced (2). This is one of many instances in which comparatively modern writers on Hindu law discussed, with as much zest as if it were living law, doctrine which in the lapse of time had become obsolete.

(1) And see Manu, Ch. IX, pl. 149 to 151.

(2) 3 Dig. Bk. V, Ch. III, pl. CLXXXIII. 1 Stra. H. L., 40 (Ed. of 1830).
Note to Translation of Manu, p. 430. Smṛiti Chandrika, Ch. X, p. 7.

In Plac. 30 Nilakantha still appears to treat of the offspring of a Sudra woman by one of the twice-born classes, and Plac. 31 applies to Pratilomas only. In Plac. 32 he treats of the Sudra class. Mr. Boiradailo translates that passage thus :—"Yajnyá-
valkya states a distinction with regard to a son begotten by a Sudra on a woman not married to him." [The words "to him" are not in the original, and appear to have been improperly introduced. The expression used is *apariniṭṭayam*, which simply means "an unmarried woman".] The translation continues :—" ' Even a son begotten by a Sudra on a female slave may take a share by his father's choice.' " [*Jatopi dasyam* (i. e., on a *Dúsi*) *Sudraṇa Kāmatonsukaro bhavet.*] The words "his father's" are not in the text, but the word *Kama*, which means "desire" or "choice", is, as we shall see, interpreted by Nilakanthá to mean "pleasure of the father". The translation continues :—" ' But if the father be dead, the brethren should make him partaker of the moiety of a share.' Choice (*Kama*), the pleasure of the father. From specifying *by a Sudra*, it is clear that a son begotten by a twice-born man on a female slave does not obtain a share, even by the father's choice : neither, after the death of the father, will he get the half : nor, in the absence of sons or other heirs, will he get the whole. This is the argument of the Madana Ratna and others."

1875.
R. V. H. AND
OTHERS
v.
GOVIND
VALAD TIJA'

It certainly would appear that Jmuta Vahana and Nilakanthá concurred in thinking that, in order to entitle the illegitimate offspring of a Sudra woman by a Sudra to inherit the property of the latter, or a share in it, she should be "an unmarried woman" (1), which expression, *aparinita* (or *apariniṭṭayam*), when occurring in pl. 28 of Chap. IX. of the Daya Bhāga, is in the note to Colebrooke's translation, p. 150, explained as "not married to any one, but kept for sensual gratification"—and for this interpretation Srikrishna is relied upon.

The condition, that the Sudra woman should never have been married to any man, has, in practice, as the cases in I. West and Buhler, to which we shall refer, show, been discarded in the Presidency of Bombay.

(1) Acc. Vivada Chintāmani, p. 275, Tagore's translation.

1875.
RAJJI AND
OTHERS
v.
GOVIND
VALABTEJA.

With a view to a clear understanding of some of those cases, it is desirable to refer to the custom, which undoubtedly extensively prevails among castes belonging to the Sudra class, and has, for a long time previously to Act XV. of 1856 (which relates to widows only) (1), existed in this Presidency, of the remarriage of wives and widows. Such remarriage amongst Mah-rattas is called *Pāt* or *Pātha*, and amongst the inhabitants of Guzerāt is named *Nātrā*. An instance, in which the Sadr Adālat refused to grant a divorce to the first wife on the ground of the husband having contracted a *Nātrā* marriage, occurs in 1 Borr. Rep., 1st edition, p. 59; 2nd edition, p. 65. Other instances of the custom of contracting such marriages are mentioned in 2 Strange H. L., pp. 399, 400. Mr. Steele, who is, on such a subject, a high authority in this Presidency, says that, though forbidden in the present age (*Kali-yug*) to twice-born castes, it is not forbidden to Sudras (2). Maun (3) appears to have limited the prohibition to the twice-born classes; Devala expressly permits remarriage to all classes (but is not followed to that extent by any other author), and almost recommends it to the servile classes (4). A text of Harita implies that Sudras may remarry (5).

Mr. Steele (6) says that "all the lower castes admit the second marriage of wives in particular instances, and of widows, the ceremonies at which differ in many respects from those at a first marriage." At pp. 168, 169, 170, 171, 171, 181, 1st ed., (7) he enumerates many instances in which it is allowed, in the cases of women whose husbands were living; but on such occasions the proper course would appear to be for the first husband to give the wife a *chhor chithi*, or writing of divorcement, and generally the concurrence of the caste is required, but not invariably. The general rule in the castes in which remarriage is permitted to a woman, although it has been disputed by some pandits, is that the children by a (*Lagna*) marriage (*i.e.*, first marriage of

(1) The words "with exceptions" in the preamble of that Act should be noted.

(2) Law and Custom of Hindu Castes, 1st ed., pp. 32, 37; 2nd ed., pp. 26, 30.

(3) 2 Dig., Bk. IV, C. IV, S. 2, pl. CLVI, p. 473.

(4) *Ibid.*, pl. CLIII, p. 471.

(5) *Ibid.*, S. III, pl. CLVIII.

(6) Law and Custom of Hindu Castes, 1st ed., p. 161; 2nd ed., 159.

(7) 2nd ed., pp. 166, 167, 168, 169, 172, 173, 179.

a woman) and those by a duly contracted *Pát* marriage have equal rights of inheritance (1).

1875.

RAJIT AND
OTHERSGOVIND
VALAD TEJA'

We think that the remarks of Messrs. West and Bühler, at page 60, Vol. I. of their work, to Case 16 (p. 59) and at page 61 to Case 17 (p. 60) and Case 18 (p. 61), must be regarded as referring to the general Hindu law; and that, in making those remarks, they had not in their immediate contemplation the custom of remarriage so generally prevalent amongst the lower castes in this Presidency. The sons of a *Punarblu* (twice-married woman) by a duly contracted *Pát* marriage, *i. e.*, in accordance with the custom of the caste, are legitimate; and rank, as to the right of inheritance and extent of shares, on a par with the sons by a *Lagna* marriage. In the second volume of their work, at pp. 15 and 16, the same learned authors mention two decisions (Cases 6 and 7) to that effect.

In the introduction to their book, Vol. I, p. XLIII, Messrs. West and Bühler, following the *Mitákshara*, lay down the rule as to the rights of inheritance of the illegitimate issue of a Sudra, thus:—"In the case of a Sudra being an *avibhaktu* (separated man) his share, on failure of the three legitimate descendants, is inherited by his illegitimate sons, grandsons, or great-grandsons. If legitimate descendants be living, the illegitimate inherit half a share." The precedents which they have collected, establish that in this Presidency, amongst Sudras, the illegitimate offspring of a kept woman, or continuous concubine, are on the same level as to inheritance as the issue of a female slave by a Sudra. Case 3 at page 48; Case 4 at page 49; Cases 6 and 7 at page 52; Case 8 at page 53; Case 12 at page 56; and Cases 13 and 14 at page 57 in I. West and Bühler—all show that this is so under ordinary circumstances in this Presidency.

Under such circumstances the plaintiff, being the son of a kept woman, would, as against the legitimate daughters of Tejá Kurad, have been entitled to a half share. This being so, we have next to consider whether the special circumstance, that the intercourse between Tejá Kurad and Gau, the mother of the plaintiff,

(1) 1st ed. p. 181, Appx. 23; 2nd. ed., p. 179.

1875. was adulterous,—she never having received a *chhoti chhoti* from
 RAHI AND her first husband, or other sanction from him of her marriage by
 OFFICERS *Pál* to Tejá Kumal—alters the case.
 HON'BLE VALAD TEJÁ. That adultery was regarded and punished by Hindu law as a
 crime of grave character, is abundantly shown by the 19th
 Chapter of the Vyavahara Mayukha and the ancient Smriti text,
 there quoted.

It has been held in the High Court that a custom of a particular caste, which permitted a woman in the life-time of her husband to contract a second marriage *without his consent* was invalid, and the remarriage punishable, as regarded the woman, under Section 494 of the Penal Code; and the act of the man, who contracted the marriage and had sexual intercourse with her, was held to be punishable, as adultery, under Section 497 of the same Code: *Reg. v. Karsan Gaja* (1). In the case of the man, he would not be punishable if, at the remarriage, he honestly believed that the woman was not the wife of another man: *Reg. v. Manohar Baiji* (2).

In the case of *Khemkar v. Umidshaulur* (3), which arose in the caste of Sompura Brahmans, which was found by the Court of Small Causes at Ahmedabad to have a custom permitting *Náhiá* or remarriage, the High Court held that a woman, who, in the life-time of her husband, had remarried *without his consent*, was not the legal wife of the person whom she so married; but, as his concubine and mother of his illegitimate children, was entitled to maintenance after his death out of his estate. Steele (4) says that the children of a woman living in adultery have no caste. In *Dattí Parisi Nayudu v. Dattí Bangaru Nayudu* (5) the High Court of Madras held that the illegitimate son of a Sudra, being the offspring of an incestuous intercourse (between a father-in-law and his daughter-in-law), is not entitled to inherit or share in the property of his putative father. That Court expressed an opinion that the decision should be the same in a case of adultery, it being an intercourse in violation of law. At page 92 of West and Bühler, Vol. I, there is a case of the year 1852 which is

(1) 2 Bom. H. C. Rep. 117.

(2) 5 Bom. H. C. Rep. Cr. Ca. 17.

(3) 10 Bom. H. C. Rep. 381.

(4) 1st ed., p. 182; 2nd ed., p. 180.

(5) 4 Mad. H. C. Rep. 204.

directly in point here. A man had two wives, one by *Lagna* and the other by *Pát*. He married a third by *Pát*; her first husband, who was living, had not assented to her second marriage. She bore a daughter to her *Pát* husband. The question was whether the daughter could succeed to her father's property after his death; and the shastri advised the Zillah Court at Sholapur that "it is not legal for a woman to enter into a *Pát* marriage without having previously obtained permission of her husband, unless he is dead. The daughter, therefore, can have no share in the property of the deceased father. But as she was the result of the *Pát* marriage, the heirs, who will take the assets of the deceased, must support her. The *Lagna* and the first *Pát* wives will be the heirs of the deceased, entitled to take all his property."

1875.
RA'HI AND
OTHERS
v.
(HINDU)
VATAD TEJA'.

Upon these authorities we think that the plaintiff, being the result of an adulterous intercourse between Tejá Kurad and Gau, cannot take *as heir* even to the extent of half a share, and is not a *Dásiputra* within the scope of Yajnyavalkya's text or recognized as such by the commentators. But, having been recognized as his son by Tejá Kurad, we think that the plaintiff is entitled to maintenance; and, in order to prevent further litigation, we shall direct the Court of first instance to ascertain and allot to him out of the estate of Tejá Kurad a liberal but suitable maintenance, having due regard to the extent of the estate.

In *Muthuswamy v. Venkataswara* (1) Sir J. Colvile in giving the judgment of the Privy Council said:—"It appears, however, to their Lordships that, if it be established that the respondent was the natural son of this Hindu father, and recognized by him as such, it is not essential to his title to maintenance that he should be shown to be born in the house of his father or of a concubine possessing a peculiar status therein. They concur in the judgment of the High Court upon this point, against which little, if anything, has been urged at the bar."

The claim of the plaintiff to *inherit* being disposed of in the negative, the estate (subject to his maintenance) will descend according to the ordinary canons of descent in force in this Presidency; but it is unnecessary to make any special reference in the

(1) 12 Moore Ind. App. 203. ; see p. 220.

1875.
 RAVI AND
 OTHERS
 v.
 GOVIND
 VALAD TISA.

decree to that effect, and we have not been invited by the parties so to do.

We shall, therefore, simply reverse the decree of the Joint Judge, and dismiss the claim of the plaintiff as heir of Tejā Kurad to his estate; but we declare that the plaintiff is entitled to maintenance out of that estate, and we direct the Court of first instance to fix a liberal and suitable maintenance for him, having due regard to the extent and value of the estate of Tejā Kurad.

Looking at the conduct of the family, we think that the fairest direction which we can make as to costs, is that the parties respectively should bear their own costs of the suit and of both appeals.

We are indebted to Mr. Justice Nánābhāi Haridās and to the Honourable Rāv Sāheb V. N. Mandlik for valuable assistance as to the original Sanskrit of the texts of Hindu law to which we have referred.

Note.—Compare *Narain Dharā v. Rakhal Gair*, 1 Ind. L. R. (Cal.) 1.

[ORIGINAL CIVIL JURISDICTION.]

Ecclesiastical.

1876.
 January 29.

IN THE MATTER OF THE LAST WILL AND TESTAMENT OF RA MCHANDRA
 LAKSHIMANJI.

VINA YAKRA V RA MCHANDRA LAKSHIMANJIAPPLICANT.

*Will—Probate—Annuity—“Value”—Court Fees Act (VII. of 1870),
 Schedule I., Clause 11.*

For the purpose of determining the probate fee to be paid in respect of an annuity the word “value” in the Court Fees Act (VII. of 1870), Schedule I., Clause 11, must be taken to mean the market value of the annuity, and not ten times the amount of a yearly payment.

Where the property, in respect of which probate is sought, is mortgaged, the amount of the mortgage incumbrance must be deducted from the market value of the property, and the probate fee charged on the balance.

The applicant in this case applied to J. W. Orr, Ecclesiastical Registrar, for probate of the will of Rāmchandra Lakshmanji, which was dated the 16th May 1871, and made in Bombay, and, therefore, came under the provisions of the Hindu Wills Act (XXI. of 1870).

By the will the testator's widow, Anapurnabai, and his son the applicant were appointed executors, and they and his daughter Manikbai were his only next of kin. The testator died possessed of both moveable and immoveable property within the jurisdiction of the High Court of Bombay, and among the moveable property was an annuity of Rs. 50,000, granted by the Secretary of State for India in Council to the testator, his heirs, executors, administrators, and assigns, to commence from the 23rd October 1877. This annuity was mortgaged, and the applicant, in his affidavit on which he applied for probate, alleged that the amount then due at the foot of the mortgage was Rs. 6,67,19-4, that the annuity was of the value of Rs. 8,00,000, and that the other property of the testator was of the value of Rs. 2,90,000.

The applicant contended before the Ecclesiastical Registrar, 1st, that no probate fee could be charged at all on the annuity, because it was not yet payable, and, moreover, even if it had been payable, it would, under the terms of the grant, have been taken by him as the testator's heir; 2nd, that if a probate fee were to be charged on the annuity, it must be calculated, not on the market value of the annuity, but, following the analogy of the Court Fees Act (VII. of 1870) and of the General Stamp Act (XVIII. of 1869), on ten times the annual payment, viz. Rs. 5,00,000, and that from this amount must be deducted the amount of the incumbrances, and as these exceeded Rs. 5,00,000, there would still be no probate fee to be paid.

The Ecclesiastical Registrar was of opinion, 1st, that the applicant being a Hindu and the heir of the testator, and there being no debts due to the estate, it was not incumbent on the applicant to take out probate, but, if he took *qua* executor or devisee, he must take out probate, and then the probate fee would rightly be charged; 2nd, that as neither the Court Fees Act nor the General Stamp Act contain any provision for computing the value of an annuity for the purpose of determining the probate fee, and there being no analogy between a probate and a suit, whatever analogy there might be between the application for probate and a suit, and it being the probate and not the application that required a stamp, no argument in support of the applicant's contention

1876.

IN THE
MATTER OF
THE LAST
WILL AND
TESTAMENT
OF
RA'MCHANDRA
LAKSHMANJI.

1876.
IN THE
MATTER OF
THE LATE
WILL AND
TESTAMENT
OF
RAMCHANDRA
LAKSHMAN.

could be drawn from the provisions of those two Acts and the probate fee must be calculated on the value of the annuity as provided by the Court Fees Act (VII. of 1870), Schedule I, Clause 11; 3rd, that, in the absence of special directions to the contrary, the value should be taken to mean the market value, and the probate fee should be charged on Rs. 10,09,000 less the amount of the incumbrances.

The question was then referred by the applicant, under Section 5 of the Court Fees Act (VII. of 1870), to C. E. Fox, Taxing Master, who under the same section referred it to the Chief Justice, with a certificate that the question was one of general importance and proper to be referred to the final decision of the Chief Justice, before whom and Sargent, J., on 29th January 1876,

Latham on behalf of the applicant submitted that, following the analogy of the Court Fees Act (VII. of 1870), Section 7, and of the General Stamp Act (XVIII. of 1869), Section 12, the value of the annuity for the purpose of charging the probate fee should be taken to be ten times the annual payment.

Scoble (Advocate General) for the Crown.—There is no analogy between the fees to be paid on the institution of suits and the fees to be paid on the taking out of probates, and the valuation of annuities in the Stamp Act is made only for the purposes of that Act. The Court Fees Act (VII. of 1870), Schedule I, Clause 11, enacts that 2 per cent. is to be charged on the amount or value of the property in respect of which probate is granted, if such amount or value exceeds Rs. 1,000, which is the case here. The word "value" must be taken to mean market value. *Nathoo Lingh v. Tofawee Lingh* (1) shows the principle to be followed.

WESTBOTT, C. J. :—We must uphold the finding of the Ecclesiastical Registrar. The annuity, although not payable until October 1877, is an item of property capable of present valuation. The provision in Section 12 of Act XVIII. of 1869, that the whole amount secured for the payment of an annuity shall be taken to be ten times the annual payment, is in that

(1) 12 Beng. L. R. 113; see p. 118.

saine section expressly stated to be made for the purposes of that Act, and we do not see how we can extend it. It also seems to us that the provisions of Chapter III. of Act VII. of 1870 must be limited to suits, and cannot be held to apply to probates. The fee payable in respect of the probate of a will is fixed by Act VII. of 1870, Schedule I., Clause 11, at 2 per cent. on the value of the property, and we consider that the value of this annuity for the purpose of determining the amount of probate fees must be taken to be the market value. In the present case, the annuity being mortgaged, the only interest in it passing under the probate is the equity of redemption; therefore the amount of the mortgage incumbrances must be deducted from the market value of the annuity, and the probate fee be charged at the rate of 2 per cent. on the balance (1).

1876.

IN THE
MATTER OF
THE LAST
WILL AND
TESTAMENT
OF
RA'MCHAN-
DRA
LAKSHMANJI.

[APPELLATE CIVIL JURISDICTION.]

NATHUBHAI BHAULAL (PLAINTIFF) v. JAVHER RA'IJI AND ANOTHER February 16.

(DEFENDANTS).

Hindu Law—Contract—Married woman—Capacity of a Hindu female to enter into a contract without her husband's consent—When such contract is binding on the husband—Stridhan.

Under the Hindu law a wife who has voluntarily separated from her husband, without any circumstances justifying her separation, is liable for debts contracted by her (even for necessities), although without her husband's consent; but her liability is limited to the extent of any *stridhan* she may have.

S. A. No. 261 of 1861 decided by Sausse, C.J., and Hobbert and Forbes, JJ., 2nd February 1863, and S. A. No. 461 of 1869, decided by Sargent and Mcvill, JJ., 17th January 1870, approved and followed.

This case was referred for the opinion of the High Court by Gopalráv Hari Deshmukh, Judge of the Court of Small Causes at Ahmedabad.

The facts of the case are briefly these:—The plaintiff Nathubhai sued Javher and Bai Hetta, brother and sister, on a promissory note, and alleged that it had been executed by both of them. Javher admitted the execution of the note, but Bai Hetta denied it, and pleaded that she was not liable, because her husband was alive. The Judge of the Small Cause Court found on the evidence that

(1) See *In the goods of Lucas*, 8 Beng. L. R. 43, Appx.

1876. the note had been executed by both Jayher and his sister, and that
 NATHUBHAI HETTA'S HUSBAND
 v.
 JAYHER RAJWANI AND ANOTHER.
 Hetta's husband was alive, and awarded the plaintiff's claim against Jayher alone, holding Hetta not liable, because she was under coverture. Plaintiff then applied for a new trial, and prayed for a decree against Hetta also. The Judge thereon referred to the High Court the question contained in their judgment.

The reference was considered by WESTROFF, C.J., and NA'NA'BHAI HARIDA's, J.

No counsel or pleader appeared on either side.

The judgment of the Court was delivered by

NA'NA'BHAI HARIDA's, J :—This is a reference made to us by the Judge of the Court of Small Causes at Ahmedabad under Section 22 of Act XI. of 1865. The question he has referred for our opinion is, "whether or not a wife, who is separated from her husband, is liable for debt contracted by her."

He has not informed us as to the circumstances under which, or as to the purpose for which, the debt was contracted; and the only facts stated to us are that it was contracted jointly by the two defendants, brother and sister, the latter being a married woman living separate from her husband; that "the defendants are of the Rájput caste and are labourers by calling"; and that, in contracting the debt, the female had acted without her husband's consent. There is not any statement that the defendant Hetta has been so ill-treated by her husband or his second wife as to warrant Hetta in leaving him, or to create a liability on his part to pay debts contracted by her for necessities. The mere circumstance of his marrying a second wife would not justify Hetta in leaving her husband (1).

We may, therefore, assume (and, if we do so erroneously, the Judge of the Small Cause Court should so inform us) that the debt was not contracted under any of the circumstances or for any of the purposes which would render her husband liable for it; and thus we do the more readily, as the plaintiff has not sought to obtain a decree against him.

(1) Steele Law and Custom of Hindu Castes (1st edn.), pp. 37-39, pl. 13, 15. 18; 6 Beng. L. R., Appx., 85; 1 Mad. H. C. Rep., 375. See also 1 Boir. Rep. (1st edn. 59, and *Ráhi v. Govind*, ante p. 97.

Such being the case, we have to consider whether the Judge is right in the broad proposition of law laid down by him, that the "contract" which she entered into with the plaintiff is "vitiated" by reason of her having done so without her husband's consent.

1876-

NAHUBHAI
BHAIJI
?
JAMIR
RAJJI AND
ANOTHER.

A Hindu female is not, on account of her sex, absolutely disqualified from entering into a contract. In the enumerations of persons incompetent to contract given by Manu, Yajnyavalkya, Kátyáyana, and Gotáma (1) a woman as such is not included; and marriage, whatever other effect it may have, does not take away or destroy any capacity possessed by her in that respect (2). She is capable of acquiring and holding property in her own right (3); and when she holds any such, her power over it is absolute. It is expressly laid down by Kátyáyana, in respect of such property, that "the power of women * * * is ever celebrated, both in respect of donation and of sale, according to their pleasure, even in the case of immovables" (4). It is further laid down by the same authority that "neither the husband, nor the son, nor the father, nor the brothers can assume the power over a woman's property, to take it or bestow it" (5), and by Manu that "such kinsmen as (by any pretence) appropriate the fortunes of women during their lives, a just king must punish with the severity due to thieves" (6). The absence of consent, therefore, on her husband's part, cannot affect her power to deal with such property; and it is impossible to hold, with the Judge of the Court of Small Causes, that a married woman's contract is necessarily void, if her husband has not consented to it.

Where she enters into a contract with the consent or authority of her husband, she acts as his agent, and binds him by her act. So also does she bind him by her contract, if she enters into it under certain circumstances, even though without such consent or authority, the law in that case empowering her to pledge her husband's credit. If, however, she enters into a contract in the absence of such consent or circumstances, she fails to bind her

(1) Coleb. Dig. Bk II, Ch. IV, Texts 57, 58, 61, and 66.

(2) 1 Str. H. L, 276. (3) Mit. Ch. II, Sec. I, 25; 3 Mad. H. C. Rep. 272.

(4) Vya. May., Ch. IV, Sec. X, 8. (5) *Id.*, Ch. IV, Sec. X, 10.

(6) *Id.*, *ib.*

1876. husband by her act. But the law does not say that she herself shall not be bound by it. On the contrary, we find it expressly laid down that she shall pay, amongst others, debts contracted by herself. Thus Yājñavalkya says: "A debt acknowledged * * * or contracted by her jointly with her husband or son (1) or contracted by the woman herself, must be paid by a wife or mother" (2); and Kātyāyana: "A debt contracted jointly with her husband or son, or singly by the woman herself, shall be paid by a wife or mother" (3). Nārada again says that "a childless widow must pay the debt of her sister enjoining payment; or whoever receives the asset left by that sister must pay her debt," (4)—a direction which necessarily presupposes in the sister the legal capacity to borrow money upon her own credit; and upon that text the author of the Rātnākara observes: "On the death of one of two sisters, left as coparceners in the house of their father, who had no male issue, the debt of that sister must be discharged by the surviving sister enjoined to pay it" (5).

Although there is no reported decision on the point referred to us, the subject seems to have engaged the attention of this Court in at least two cases. Both of them were like this, cases from Ahmedabad. One of them, S. A. No. 261 of 1861, was a suit against a high-caste Native lady, in which the plaintiff sought to recover from her a large sum of money due on a bond executed by her. The principal question raised in that special appeal, that upon which the whole case would appear to have ultimately turned, was, whether she was liable, being under the protection of her husband who had not consented to the transaction; and the Court (Sir M. Sausse, C.J., and Hebbert and Forbes, JJ.) on the 2nd February 1863 upheld the District Judge's decree, awarding with costs the full amount claimed, to be recovered from the defendant *stridhan*.

(1) The words "or son" do not appear in the original Smṛiti ff. 50, a; published in Bombay and quoted in the Vyav. May., Ch. V, Sec. IV, 20, nor the words "or mother".

(2) Coleb. Dig., Bk. I, Text 210.

(3) *Id.*, Bk. I, Text 211. Viramitrodaya 353 (Calc. Edn. 1875).

(4) Coleb. Dig., Bk. I, Text. (5) *Id.* *ib.*

The other case, S. A. No. 467 of 1869, was a suit to recover from one Nathi and another woman a sum of money due upon a bond alleged to have been executed by them jointly to the plaintiff. Nathi's defence was, *first*, that she had not executed the bond, and, *secondly*, that, being a married woman, she was incompetent to execute it and, therefore, not liable. Upon both of these points the Principal Sadar Amin found in her favour, and he accordingly rejected the claim. That decision, however, was reversed, on appeal, by the Assistant Judge, who held the bond proved, and also that Nathi was personally liable upon it, notwithstanding that her husband was alive. In special appeal against that decision she relied upon coverture as absolving her from all liability upon the bond sued on, which point was ruled against her, and the Court (Sir C. Sargent and Melvill, JJ.,) on the 17th January 1870 amended the Assistant Judge's decree "by striking out so much of it as makes" her "personally liable, and inserting words limiting" her "liability * * * to the extent of her *stridhan*, including the house mentioned in the bond."

1876.

NATHI A'I
BHA'ILAL
v.
JAVHER
RA'IJI AND
ANOTHER.

We are of opinion that those cases were properly decided, and our reply to the Judge of the Court of Small Causes will accordingly be that a wife who has voluntarily separated from her husband without any circumstances justifying her separation, is liable for a debt contracted by her (even for necessaries), although without her husband's consent; but her liability is limited to the extent of any *stridhan* she may have.

[APPELLATE CIVIL JURISDICTION.]

GUMNA DAMBERSHET (PLAINTIFF AND APPELLANT) v. BHIKU HARIBA
AND ANOTHER (DEFENDANTS AND RESPONDENTS). February 16.

Limitation Act XIV. of 1859, Section 1, Clause 10—Promissory Note payable by instalments—Waiver of default.

A promissory note, dated 2nd April 1868, stipulated that the principal amount with interest was to be repaid by half-yearly instalments of Rs. 150 each, and that,

1876. in the event of any one of these instalments not being punctually paid, the whole amount was to become payable at once. Default was made in payment of the first instalment, which fell due on the 2nd October 1868. In an action brought on the 19th October 1871 for the recovery of the whole amount,

GUMNA
DAMBERSHET
v
BHIKU HARI-
BA AND
ANOTHER.

Held that the right to bring the suit under Act XIV. of 1859, Section 1, Clause 10, accrued to the plaintiff on the 2nd October 1868, and that, having omitted to bring it for more than three years, he was too late in instituting it on the 19th October 1871.

Held, also, that the plaintiff's right to the immediate payment of the whole amount was not, under the note, subject to be defeated by any subsequent payment, and that no such subsequent payment (assuming it to have been made) could, in the absence of any fresh agreement, supersede or suspend such right.

The proposition laid down in *Rāmkrishna Mahādev v. Bayagi Santāgi* (1) * that, although the instalments were not paid by the defendants at the times fixed for payment, yet the defendants having paid the money on account of them, and the plaintiff having accepted it, the payments must be considered, as regards both parties, as if made at the times fixed; and the plaintiff cannot take advantage of the stipulation that the sum should become due on failure to pay any instalment, or the defendants rely upon it as making the whole debt due and fixing the period from which the time of limitation ran," over-ruled, as there is nothing in Act XIV. of 1859 to give any such effect to an acceptance of part payment after the whole debt has become due.

THIS was a special appeal from the decision of Baron Larpent, District Judge of Poona, affirming the decree of Mahādev Govind Rānade, 1st Class Subordinate Judge at the same place.

The facts of the case are briefly these:—Gumna Dambershet sued Bhiku and another on a promissory note for Rs. 1,549, bearing date 2nd April 1868. The note was payable by half-yearly instalments of Rs. 150 each, and contained a stipulation that, in default of the payment of any one instalment, the whole amount of the principal money and interest should be paid at once. The first instalment, which fell due on the 2nd October 1868, was not paid on that date. The plaintiff, however, alleged that, about four months after this default, the defendants made and the plaintiff accepted payments on account of the first instalment. Default being made in payment of the second instalment (2nd April 1869), the plaintiff brought the present suit, on the 19th October 1871, to recover Rs. 1,900 on account of the principal sum and interest due on the promissory note. The defendants, among other objections, pleaded limitation, and contended that the cause of action arose at the time of the first default. Both the Lower Courts held the claim barred,

on the ground that it had been brought more than three years after 2nd October 1868, when the first default was made. They, however, did not determine whether or not the amount of the first instalment was paid to, and accepted by, the plaintiff, as alleged by him, after the due date.

1876.

GUMNA
DAMBERSHET
v.
BHIKU HARI-
BA AND
ANOTILLR.

The only point argued in the special appeal was the question of limitation.

The special appeal first came on for hearing before WESTROPP, C. J., and NA'NA'BHA'I HARIDA'S, J., who referred it to the consideration of a Full Bench, in consequence of the conflicting rulings in *Rámkrishna Mahádev v. Bayági Santági* (1) and *Hurronauth Roy v. Maheroolah Moollah* (2) on the point of limitation raised in the case. Accordingly, the appeal was argued before WESTROPP, C. J., WEST and NA'NA'BHA'I HARIDA'S, JJ.

Dhirájlál Mathurádás (Government Pleader) for the special appellant:—The plaintiff (the special appellant) has alleged that, some time after the default in payment of the first instalment had been made, the defendants offered and the plaintiff accepted the amount of that instalment. If so, the case comes exactly within the principle laid down by Sir R. Couch in *Rámkrishna Mahádev v. Bayági Santági* (3), and the claim is not barred, as held in that case. That acceptance amounted to a waiver, on plaintiff's part, to demand the whole amount. Moreover, the acceptance may be regarded as evidence of a fresh agreement between the parties.

[WESTROPP, C. J.:—There is no allegation in the plaint of any such new agreement. Besides, there was no new consideration.]

The Full Bench case of *Hurronauth v. Maheroolah* (4), no doubt, is against me; but I rely upon the decision of our own High Court in *Rámkrishna v. Bayági* (5).

Bhairavnáth Mangesh for the special respondents:—This case is governed by Act XIV. of 1859. When limitation once begins to run under that Act, nothing can stop it, except the provisions of Section 4. That section does not provide that a claim once

(1) 5 Bom. H. C. Rep. 25 A. C. J.

(3) 7 Calc. W. Rep. (F. B.) 21 Civ. Rul.

(3) 5 Bom. H. C. Rep. 35 A. C. J. (4) 7 Calc. W. R. 21 Civ. Rul.

(5) 5 Bom. H. C. Rep. 35 A. C. J.

1876. barred, is taken out of the law of limitation by part payment.
GIVEN A The Full Bench ruling in *Hareenduth v. Moheroodin* (1) is a case
DAMNABLE exactly in point. In that case, the first instalment, paid and
SHIRT HALL accepted after default, was held not to amount to the revival
13 AND of a barred claim. There is a case, *Muddabur v. Hara* (2), which
ANOTHER, is opposed to the Full Bench ruling just cited. But that was a
 case under the old law of limitation in Bengal, viz. Regulation III. of 1793. He then referred to *Pengappaiyan v. Rajappaiyan* (3).

Dhirajlal Matherdás in reply.

NA'NA'BHÁ'I HARTDA'S, J.:—This is a suit upon a promissory note dated the 2nd April 1868. The note, among other things, stipulates that the principal amount, with interest at 12 per cent. per annum, is to be repaid by half-yearly instalments of Rs. 150 each, and that, in the event of any one of those instalments not being punctually paid, the whole amount is to become payable at once.

The first instalment accordingly fell due on the 2nd October 1868, when it was not paid, and this suit was instituted on the 19th October 1871. The Subordinate Judge and the District Judge in appeal have both held it barred by the law of limitation; and the only question, therefore, which we have to determine now is, is it so barred?

The law of limitation applicable to this case is Act XIV. of 1839, of which Clause X., Section 1, provides as follows:—

“To suits brought to recover money lent or interest, or for the breach of any contract in which there is a written engagement or contract, and in which such engagement or contract could have been registered by virtue of any law or regulation in force at the time and place of the execution thereof, the period of three years from the time when the debt became due, or when the breach of contract in respect of which the action is brought first took place, unless such engagement or contract shall have been registered [within six months from the date thereof]” (1).

(1) 7 Cal. W. R. 21 Civ. Rul. (2) 1 Cal. W. R. 189 Civ. Rul.

(3) 1 Mad. H. C. Rep. 208.

(4) The words within brackets were altered by Act XX. of 1866, Section 27, to “within the time prescribed in that behalf by the Indian Registration Act, 1866.”

The promissory note in this case is "a written engagement or contract" within the meaning of that clause, which "could have been registered" under Act XX. of 1866, Section 18, "at the time and place of the execution thereof", but was not. The period of limitation, therefore, within which a suit may be brought upon it is "three years from the time when the debt became due". We are thus brought to the question, when did the debt for which this suit is brought, become due?

The defendants, (*inter alia*), contend that, upon their failure to pay the first instalment on the 2nd October 1868, the whole money became payable at once under the express stipulation to that effect in the promissory note, and that, therefore, this suit, which was not brought till the 19th October 1871, is barred.

The plaintiff, on the other hand, contends that, notwithstanding the defendants' failure to pay the first instalment at the time it fell due—namely, on the 2nd October 1868—he waived his right to exact payment of the whole amount by subsequently accepting payment of that instalment; that, therefore, until a second default was made in the payment of the next instalment six months after, no right would accrue to him to demand any payment; and that this suit, which is within three years from such second default, is consequently not barred.

Neither the Subordinate Judge nor the District Judge has found whether the plaintiff's allegation as to the subsequent payment to him of the amount of the first instalment by the defendants is proved; and if we thought such payment could make any difference, it would be necessary to have that expressly found by the Courts below. But it seems to us to be immaterial. The note sued on, as already stated, distinctly stipulates that, on failure to pay any one instalment, the whole amount shall at once become due. That contingency having happened on the 2nd October 1868, the plaintiff became entitled to the whole of the money at once (1). He might, accordingly, have sued for the whole amount any day after that date. His right to immediate payment thereof was not, under the note itself, subject to be defeated by any subsequent payment, nor was it superseded or suspended by any fresh agreement between the parties; and we do not see how,

1876.

GUMNA
DANBERSHEP
v.
BHIKU HARI-
BA AND
ANOTHER.

(1) 7 Cal. W. R. 21 Civ. Rul. 7 Bom. H. C. Rep. 125 A. C. J. 11 *Idem* 155. .
1 Mad H. C. Rep. 209. 12 L. J. Q. B. 134.

1876. under the circumstances, any such payment, by the defendants, of
 GEMNA part of that for which they had already become liable could, in the
 DAMBERSHET absence of any fresh agreement, supersede or suspend such right.
 " There is not any fresh agreement alleged here. The suit is
 BHIRU HARI- brought on the note itself.
 RA AND
 ANOTHER,

In *Ramakrishna v. Bayaji* (1) it was, no doubt, held by a Division Bench of this Court, consisting of Couch, C. J., and Newton, J., "that, although the instalments were not paid by the defendants at the times fixed for payment, yet the defendants having paid the money on account of them, and the plaintiff having accepted it, the payments must be considered, as regards both parties, as if made at the times fixed, and the plaintiff cannot take advantage of the stipulation that the sum should become due on failure to pay any instalment, or the defendants rely upon it as making the whole debt due and fixing the period from which the time of limitation ran." But we are unable to accept that view. There is nothing in the Limitation Act (XIV. of 1859) to give any such effect to an acceptance of part payment after the whole debt has become due. The creditor is, no doubt, not bound immediately to sue for, or insist upon payment of, the whole debt. He may, if he chooses, show forbearance towards his debtor, and accept a part of what is due. But, if he does so, he does not thereby prevent, or change in any way, the operation of the law of limitation, which, notwithstanding any such subsequent wish on his part, begins to run from the time of the first default rendering the whole amount due: see *Hemp v. Garland* (2); *Hurronauth v. Maheroolah* (3); *Karuppanna v. Nallamma* (4); *Narayanappa v. Bhaskar* (5); *Nawalmal v. Dhondibi*. (6)

In equity it has been held that, a debt being presently due, an agreement to pay by instalments, with a stipulation, that on default the creditor may demand immediate payment of the whole balance due with interest, is not to be relieved against: *Sterne v. Beck* (7).

(1) 5 Bom. H. C. Rep. 35 A. C. J.

(2) 4 Q. B. 519, 524; S. C. 12 L. J. Q. B. 134; 3 G. & D. 402. 7 Jur. 302.

(3) 7 Cal. W. R. (F. B.), 21. (4) 1 Mad. H. C. Rep. 209.

(5) 1 Bom. H. C. Rep. 125 A. C. J. (6) 11 Bom. H. C. Rep. 155.

(7) 32 L. J. Ch. 682.

Assuming, therefore, that the alleged part payment by the defendants really took place, if the plaintiff in this case had chosen the very next day after such payment to sue for the whole of the amount then remaining unpaid, he might have done so, and we do not think the defendants in that case could have successfully contended that no cause of action had accrued, or that the suit was premature because the second instalment had not fallen due.

We must, accordingly, hold that the right to bring this suit accrued to the plaintiff on the 2nd October 1868; that, having omitted to bring it for more than three years, he now comes too late; and that the decrees of the Lower Courts rejecting his claim on that ground are correct, and must be upheld.

Decree affirmed.

Note.—In *Hullodhur Bangal v. Hogg*, 1 Calc. W. R. 189 Civ. Rul. (which was a case under Act XIV. of 1859, and not, as stated in the argument *supra*, under the old law), it was held that the question in cases of this description is whether the payment was made on account of the whole amount payable under the bond, treating that whole amount as having become due under the condition, or on account of an instalment, and that if it was made on account of an instalment it would go to show a waiver or agreement to restore the original provision for payment by instalments.

The case of *Hurronauth Roy v. Maheroolah* (7 Calc. W. R. 21 Civ. Rul.), cited in the present case, and which appears to have been heard without the aid of counsel, is so imperfectly reported that it is difficult to say whether the distinction taken in *Hullodhur Bangal v. Hogg* was followed or not in it, though it is not easy to understand the *ratio decidendi* except on the ground of some such distinction. The Court rested its decision on the fact that the petitioner sued on the original contract and not on any fresh one. The distinction in question has been observed both in Madras and in the North-Western Provinces. Thus in *Sir Rajah Papanna v. Toleti* (5 Mad. H. C. Rep. 198), in which it was held that the acceptance of payment amounted to a waiver of the condition of forfeiture, the Court seems to base its decision on the circumstance that the payment was “of one or more sums as an instalment or instalments due on the bond”.

Similarly *Gyan Chaud v. Jawahur* (2 N. W. P., H. C. Rep. 83), in which it was held that a plaintiff who had accepted payment after default could not enforce the condition, was expressly decided on the ground that the sums paid “must be held, on the Judge’s finding, to have been paid and received on account of the instalments”.

In *Mulho Singh v. Thakoor Pershad* (5 N. W. P., H. C. Rep. 35) in which the acceptance of payment was held not to take the case out of the operation of the Act, it was not shown that any of the payments made within the 3 years before suit had been made on account of an instalment.

See Act IX. of 1871, Sch. II., number 75.

1876.

GUMNA
DAMBERSHET
v.
BHUHU HARI-
BA AND
ANOTHER.

[ORIGINAL CIVIL JURISDICTION.]

1876,
March 30.

SHEPHERD (PLAINTIFF) v. THE TRUSTEES OF THE PORT OF BOMBAY
(DEFENDANTS).

Injunction—Libel—Charities—Bombay Act I. of 1873.

The Court will not grant an injunction to restrain the publication of a libel; nor to restrain, at the suit of an individual, an act of a corporate body, on the ground of such act being *ultra vires*, except where such individual has been damaged by such act in his rights of ownership, repute, or easement.

There is no authority for the proposition that an individual is entitled to protection by way of injunction against the act of a corporation, though in excess of their powers, which affects that individual's character and reputation, whether private, professional, or commercial, which he would not have been entitled to had the act complained of been committed by an individual defendant, on the ground that the act in question was one which the corporation had no power to do under the instrument of incorporation.

The Trustees of the Port of Bombay have the power to record their decisions and opinions with regard to matters connected with the business they have under their Act power to transact; whether such decisions or opinions are confined to statements of what they believe to be actual facts, or extend also to giving advice for the conduct of their successors in office with regard to business, and whether the expression of such decisions, opinions, or advice may include statements injurious to the character or reputation of others.

Where, therefore, the plaintiff sought for an injunction to restrain the Trustees of the Port of Bombay from publishing two resolutions alleged to affect injuriously on his character and reputation, on the ground that it was not within the powers conferred on the Trustees by Bombay Act I. of 1873 to discuss or pass resolutions affecting his character, and that the publication of such resolutions was calculated to injuriously affect him in his commercial relations with the Government,

Held that the injunction could not be granted.

Held also that though the Court, under certain circumstances, might have the power of so framing an order for injunction as to produce the effect of cancelling the minutes of a resolution recorded in the books of a corporate body, yet that it could not order the Trustees of such body to pass and record a resolution dictated by the Court.

The plaintiff is a contractor with the Government of Bombay for the carriage of mails and passengers across the harbour of Bombay, and for this purpose runs a line of steamers, generally known as the ferry steamers. The defendants are the Trustees of the Port of Bombay, appointed under the provisions of the Bombay Port Trust Act (Bombay Act I. of 1873). The plaintiff hired one of the steamers of the defendants, named the "Dromedary", for Rs. 40 per diem, on the condition, amongst others, that he should return it to the defendants in the same

or as good order and condition as it was in when handed over to him by the defendants. The plaintiff alleged that when the steamer was made over to him it was not opened out so that he could make a thorough inspection of it, that shortly after it had been handed over to him it twice broke down, that on each occasion he had the necessary repairs made, and that while such repairs were being made the steamer had to be docked, and was consequently useless to him for a fortnight. When the plaintiff returned the steamer to the defendants they had it opened out, and a list of the defects then existing was made by the engineer to the Port Trustees, which was forwarded to the plaintiff. The plaintiff employed a firm of engineers in Bombay to make an estimate of the expense of remedying these defects, and the engineers estimated such expense at Rs. 520. The defendants meanwhile had an estimate made in the Government Dockyard, which showed that Rs. 3,000 would be necessary to remedy these defects, or rather to put the vessel in the same state as she was in at a certain date shortly before she was delivered to the plaintiff. The defendants accordingly claimed from the plaintiff the sum of Rs. 3,000 and a further sum of Rs. 560 as hire for fourteen days. The plaintiff denied his liability for the Rs. 560 as hire for the steamer during the fourteen days that it had been docked for repairs, and, though not admitting his liability in respect of the defects pointed out by the engineer of the Port Trustees, offered to pay Rs. 520, the sum named by his own engineers as the expense of remedying such defects, in full satisfaction of all claims against him by the Port Trustees. After some correspondence on the subject the offer of the plaintiff was finally accepted by the defendants at a meeting of the Port Trustees held on 10th February 1876. The resolution of the defendants accepting the offer of the plaintiff was entered on their minutes in these terms :—" Mr. Shepherd's offer of Rs. 520, in full of all claims, should be accepted ; but any further transaction with him should be avoided if possible." A copy of this resolution was forwarded to the plaintiff, who on its receipt wrote to the Port Trustees, complaining that the concluding sentence seemed offensive, and asking that it should be expunged. In reply the defendants forwarded to the plaintiff another resolution, passed on 17th February 1876, in the following words :—" Mr. Shepherd should be informed that the Trustees adhere to their

1876.

SHEPHERD
THE TRUS-
TEES OF THE
PORT OF
BOMBAY.

1876. former resolution already passed." The plaintiff thereupon filed this suit against the defendants to have the two minutes of 10th February and 17th February set aside or rectified, and for damages for libel. In his original plaint he prayed that the defendants might be ordered to annul the two resolutions, or that the same should be set aside or rectified, and that in the meantime the presidents of the two meetings at which these resolutions were passed might be restrained from signing the resolutions and from transmitting them to the Secretary to the Local Government, or in any other manner publishing them, and claimed damages for the libel Rs. 10,000.

SHEPHERD
v.
THE TRUSTEES
OF THE
PORT OF
BOMBAY.

On 2nd March, 1876, *Gill* for the plaintiff obtained a rule *nisi* for an injunction in the terms of the prayer of the plaint, and an *interim* injunction until the argument of the rule. On 4th March the defendants' solicitors informed the plaintiff's solicitors that at the time of the granting of the rule *nisi* the resolutions had been already signed and transmitted to the Secretary to the Government, and offered to give an undertaking to the plaintiff not to publish the resolutions. The plaintiff thereupon amended his plaint, and striking out the original prayer, prayed for a declaration that the defendants had acted in excess of their powers in passing, recording, signing, and sending up to Government the two resolutions of 10th February and 17th February, and that the defendants might be restrained from continuing to retain and allowing to remain recorded on their minutes these two resolutions, without passing, recording, signing, and sending up to Government some other resolution rescinding them, and claimed damages for the libel Rs. 20,000. On 18th March 1876 a notice of motion was sent by the plaintiff's solicitors to the defendants' solicitors informing them that the Court would be moved to grant an injunction in the terms of the prayer of the amended plaint, to amend the rule *nisi* accordingly, and to make absolute the rule *nisi* when so amended. The motion was made accordingly.

Gill and *Agnew Turner* for the plaintiff in support of the motion:—The Court will grant an injunction in such a case as this where the injury is irreparable, continuing, and not capable of being measured by damages. If the defendants were justified in passing the resolutions, they were not justified in recording them.

on their minutes. Their doing so is a continuing injury against which the Court will grant an injunction: *Lauluss v. The Anglo-Egyptian Cotton Company* (1), *Philadelphia Railway Company v. Quigley* (2). But the passing of these resolutions, still more the recording of them, was *ultra vires* of the defendants, and the Court will restrain a corporation from acting *ultra vires*: *The Corporation of Ecton v. Earl of Devon* (3), *Abrahams v. The Mayor, Aldermen and Commons of London* (4), *Richmond v. N. London Railway Company* (5), *The Midland Railway Company v. London and N. W. Railway Company* (6). The Court will grant a mandatory injunction against a corporation: *Great N. of England, &c., Railway Company v. The Clarence Railway Company* (7).

1876.
SHEPHERD
v.
THE TRUS-
TEES OF THE
PORT OF
BOMBAY.

Marriott, Advocate General (Acting) and *Pigot*, *contra*:—A court of equity has no jurisdiction to grant an injunction to restrain a libel, even if injurious to property: *The Prudential Life Assurance Company v. Knott* (8), *Mullorn v. Ward* (9). By the terms of the Act under which they are constituted, the Port Trustees are bound to record their resolutions and to forward a copy of the record to Government; any such communication is clearly privileged: *Corbush v. Richards* (10), *Aman v. Damm* (11). On the point of malice: *Whitfield v. The South-Eastern Railway Company* (12). If the plaintiff applies for an injunction against a corporation he must do so as one of the public: *Painter v. The London Brighton and South Coast Railway Company* (13). The Court has no power to restrain a libel. It has power to restrain some acts *ultra vires*; but if the recording of such resolutions as these be *ultra vires*, it can be so only on the ground that they are libellous, for the Port Trustees are by their Act directed to record their resolutions as a general rule.

(1) L. R. 4 Q. B. 262; 5 C. 33 L. J. Q. B. 129.

(2) 21 How. (Rep. Sup. Ct. U. S.) 202 cited at L. R. 1 Q. B. 265 and in *Manley Smith on Mast and Sciv.* 266

(3) L. R. 10 Eq. 232. (4) L. R. 6 Eq. 625; 5 C. 37 L. J. Ch. 732

(5) L. R. 3 Ch. Ap. 679 (6) L. R. 2 Eq. 524

(7) 1 Col. 507. (8) L. R. 10 Ch. Ap. 142. (9) L. R. 13 Eq. 619.

(10) 2 C. B. 569; 5 C. 15 L. J. C. P. 278; 10 Jur. 597.

(11) 8 C. B. N. S. 597, 5 C. 29 L. J. C. P. 313; 7 Jur. N. S. 47

(12) 27 L. J. Q. B. 229. (13) 2 C. B. N. S. 702.

1870:

Gill in reply.

SHEPHERD
THE TRUSTEES OF THE
PORT OF
BOMBAY.

[GREEN, J.:—It is clear there can be no injunction to restrain a libel. I wish you to show me how these resolutions are *ultra vires* of the defendants for it seems to me that they can be *ultra vires* only on the ground that they are libellous.]

They would have been equally *ultra vires* had they been laudatory of the plaintiff. In that case, no doubt, the plaintiff would have had nothing to complain of; and, if the other members of the community had been injured by such a resolution—for instance, as “Mr. Shepherd is the only honest man in Bombay”—they could have restrained the defendants from so acting *ultra vires* only by setting the Advocate General in motion. But in the present case the plaintiff suffers a peculiar injury in his relations with the Government by the act of the defendants. The reason for the rule, that courts of equity will not restrain a libel, is that it is no injury to property; but this act of the defendants, by rendering the Government unwilling to renew their contract with the defendant, is an injury to his property. We do not ask, and never did ask, for an injunction to restrain a libel, but to restrain an act injurious to us, which is *ultra vires* of the defendants. The powers of the Port Trustees are defined in the Port Trust Act, and nowhere do we find amongst them a power to pass resolutions commenting, whether favourably or unfavourably, on the character, conduct, or dispositions of private individuals, nor can the Court go beyond the express words of the Act and say that such a power is impliedly given.

[GREEN, J.:—It seems to me part of the business of the Port Trustees, if they are dissatisfied with the man with whom they are dealing, to record that opinion for the guidance of their successors.]

The plaintiff, not being a servant of the Port Trustees, it is a perfectly gratuitous act on their part to pass such a resolution. It cannot be within the course of the ordinary business of the Port Trustees to pass resolutions commenting on the character of others; for, so often as such resolutions were libellous, they would be breaches of the law. It may be that the act which we seek to restrain, is calumnious; but it is not because it is a calumny that we seek to restrain it, but because it is a continuing irreparable injury and

an act *ultra vires* of the defendants. The Port Trustees exist only for the purposes of the Act under which they were appointed: Kerr on Injunctions, 350. It lies on them to show how they were acting within the powers conferred on them by that Act in passing these resolutions, not on me to prove a negative.

1876.

SHEPHERD
v.
THE TRUS-
TEES OF THE
PORT OF
BOMBAY.

[GREEN, J.:—Supposing one of the collectors of port dues embezzles the money which he receives, are the Port Trustees not to record their reason for dismissing him?]

Such a collector would be a servant of the Port Trustees, but the plaintiff is a stranger.

[GREEN, J.:—Not a mere stranger. He was a party to a contract with the defendants, and it was with reference to that contract that these resolutions were passed.]

Even in the case of a defaulting servant, the Port Trustees would not be justified in keeping the resolution on their minutes after it had served the purpose for which it was passed.

Curr. adv. vult.

On 30th March 1876 the following judgment was delivered by

GREEN, J., who, after reviewing the facts stated above, proceeded:—Though the plaint, as originally framed, does (amongst other things) allege that the passing of resolutions reflecting on the character of private individuals is *ultra vires* the defendants as Trustees of the Port of Bombay, yet the scope and gist of the case there made is, that the defendants had by their said resolutions defamed the plaintiff, though such defamatory matter is not alleged to have been as yet published, and the relief sought is for damages, and in the meantime and till the hearing for an injunction against publishing such resolutions, and in particular transmitting the same to the local Government. On the same day as the original plaint was filed, viz., the 2nd instant, a rule was granted calling on the defendants to show cause why the president or presidents of the meetings of the 10th and 17th February, in the plaint mentioned, should not be restrained by injunction from signing the resolutions in question, or either of them, and why the said defendants, their servants, &c., should not in like manner be restrained from transmitting such resolutions to

1876. the Secretary of the local Government, or in any other manner
 SHEPHERD publishing or causing the same to be published. It was further
 THE TRUS- ordered that in the meantime, and until further orders, the said
 TRUSTEES OF THE defendants, &c., should be restrained from publishing or causing to
 PORT OF be published, the said resolutions or either of them. The rule of
 BOMBAY. the 2nd March appears to have been served on the defendants on
 the same day. It was, however, applied for too late to restrain the
 signing and transmitting of the resolutions in question, as the
 resolution of 10th February had, it appears, after having been
 signed by the President, been forwarded to the Secretary to Govern-
 ment on the 19th February, and that of the 17th February had,
 after being signed as aforesaid, been transmitted as aforesaid on the
 28th February. On the 4th March, but after the service of the
 rule *nisi*, the defendants' solicitors wrote to the plaintiff's solicitors
 a letter of that date, in which, after informing the plaintiff that
 the resolutions complained of had in the previous month, and on
 the dates already named, been already signed and transmitted
 to the Secretary to Government, they write as follows:—"With
 regard to the publishing of the resolutions, we beg to call your
 attention to the fact that it is your client who has caused them to
 be published by what appears to us to have been an entirely
 premature and unnecessary application for the injunction. The
 Trustees had no intention of making these resolutions public,
 and this fact your client might have ascertained for himself if
 he had made inquiry on the subject of the Trustees." The letter
 then proceeds to state, and it is a fact of considerable importance
 with regard to the existence, on the part of the Trustees, of
 any actual intention to injure the plaintiff's reputation, at least
 outside the circle of the Trustees themselves: "If he (*i.e.*, the plain-
 tiff) saw the newspapers in which excerpts of the proceedings of the
 meetings of the 10th and 17th February are published, he must have
 seen that these resolutions were not included in them." The letter
 then goes on:—"The defendants are prepared to give an undertaking
 that they will not in any way publish, or cause to be published, the
 resolutions or either of them," and suggests to the plaintiff that he
 should desist from further proceeding with the rule which had been
 granted. On the 7th March the plaintiff's solicitors wrote in reply,
 asking that the Trustees should pass another resolution rescinding

plaintiff, and, should that be done, the plaintiff would revert to his original offer of Rs. 520 in settlement of all matters in dispute, the defendants paying the plaintiff's costs already incurred. In the reply of the same date of the defendants' solicitors they decline to adopt the course suggested in the last letter of the plaintiff's solicitors, and state that in passing the resolutions complained of, the Trustees had not in contemplation to do the plaintiff any injury, their only object being to record their decision with reference to the matters then before them, and that in sending up the resolutions to Government they were only acting in pursuance of Section 14 of their Act. The learned Judge, having then stated the amendment of the plaint and the subsequent proceedings, continued :—

1876.

SUPREMACY
OF THE TRUSTEES
OF THE
PORT OF
BOMBAY.

Had the present been simply an application to restrain by injunction the publication, or further publication, of matter alleged to be defamatory, there can be no question that on the authorities it is one which cannot be sustained, and the learned counsel for the plaintiff has fully admitted this. It is true that in the cases of *The Springhead Spinning Company v. Riley* (1) and *Dixon v. Holden* (2) Vice-Chancellor Malins granted an injunction when in the first-named case the defendants had by placards and advertisements sought to deter workmen from taking employment with the plaintiffs, and in the latter case where the defendant (who was solicitor for a bankrupt firm of Dixon Brothers, consisting, as the plaintiff alleged, of one Hugh Dixon and one Launcelot Dixon) had intimated his intention to publish an advertisement of a meeting of the creditors of Dixon Brothers, which advertisement contained an allegation that the plaintiff, William Dixon, was a partner of the firm of Dixon Brothers, though the defendant, as the plaintiff by his bill alleged, was well aware that the plaintiff was never a partner, and never had any interest in that firm. In the last-named case the Vice-Chancellor did not grant the injunction, as being an injunction against the publication of a libel merely, but by way of a protection of the commercial character of the plaintiff treating an injury to the commercial character and credit of a merchant as being in the nature of an injury to property. In the case, however, of the *Prudential Life Assurance Company v. Knott* (3)

(1) L. R. 6 Eq. 551. (2) L. R. 7 Eq. 488. (3) L. R. 10 Ch. Ap. 142.

1876.
SHEPHERD
THE TRI-
STES OF THE
PORT OF
BOMBAY.

before the Lord Chancellor and Lords Justices, the decision of Vice-Chancellor Malins in these two cases was distinctly disapproved of, and these cases may be treated as having no authority; and the Court of Appeal affirmed the principle that an injunction will not be granted to restrain the publication of injurious statements, even though distinctly affecting complainants in respect of their trade and business. The Lord Chancellor says:—"If, on the other hand, these comments do amount to a libel, then, as I have always understood, it is clearly settled that the Court of Chancery has no jurisdiction to restrain the publication merely because it is a libel. There are publications which the Court of Chancery will restrain, and those publications as to which there is a foundation for the jurisdiction for the Court of Chancery to restrain them, will not be restrained the less because they happen to be libellous." The class of cases which the Lord Chancellor may probably have had in his mind when he speaks of publications, as to which there is a foundation for the jurisdiction of the Court of Chancery to restrain, are such as where papers, documents, copies of books, &c., have come into the possession or knowledge of solicitors, agents, accountants, merchants' clerks, &c., in the course of their employment. The publication of such documents the Court will restrain, as being a breach or abuse of the confidential relation by which the power of publication or communication has come to the person sought to be restrained. To the same class may be referred the cases where the Court restrains the publication of manuscript works without the consent of the author (who is to be treated as having, previous to publication, a right analogous to a right of property in his MS.), or the publication by a receiver of a letter without the consent of the writer and sender. It is considered that by sending a letter to another the sender gives the receiver a right to read and keep it, but not to publish its contents to the world. In such cases as the foregoing there is, as the Lord Chancellor says, a foundation of jurisdiction to restrain publication, which jurisdiction will not be the less exercised by reason that the matter to be published may also be libellous. It is not, however, as I have mentioned, on the ground of any alleged jurisdiction of this Court to restrain by injunction the publication of libels as such that the learned counsel for the plaintiff attempts to sustain his application. I understood his

argument to be this. The defendants are constituted a corporation by their Act (Bombay Act I. of 1873) with certain defined trusts and powers. It is no part of the trusts and powers so vested in them to pass, record, and transmit to the local Government resolutions, which though they may concern business which the Trustees have power to transact, *also* contain observations affecting favourably or unfavourably the character or credit of persons not members or servants of the corporation. It is contended that, as the resolutions complained of are calculated to injure the character of the plaintiff in his business of contractor for the carriage of goods and passengers, and specially in respect of this that such resolutions are transmitted and brought to the notice of the local Government, with whom the plaintiff's contracts have been and are hereafter likely to be made, the plaintiff has made out a case for the exercise of the jurisdiction the Court undoubtedly has, of restraining corporations or companies created by Royal Charters or Acts of Parliament from acting in excess of the powers conferred by such Charters or Acts, when such excess causes injury to an individual or a larger or smaller portion of the public. As illustrations of the principles contended for having been applied, the following cases were cited on behalf on the plaintiff:—*The Mayor and Corporation of Exeter v. The Earl of Devon* (1), *Abrahams v. The Corporation of London* (2), *Richmond v. The North London Railway* (3), and *the Midland Railway v. The North-Western Railway* (4). It is not necessary to discuss the details of these cases, which are very different from anything to be found in the present case. The first case decided that where an Act of Parliament conferred on a corporation the power to remove obstructions to navigation of a river, paying compensation to the owner of the land where such obstruction was, the corporation were not thereby authorized to maintain a suit in equity in respect of an obstruction. The second and third cases were an example of this, that where corporations or public companies are taking lands under compulsory powers of purchase they must strictly pursue the course of proceeding marked out in the Act; and the fourth is merely a decision in the particular case that a cer-

1876.

SHEPHERD
THE TRUSTEES OF THE
PORT OF
BOMBAY.

(1) L. R. 10 Eq. 232. (2) L. R. 6 Eq. 625. (3) L. R. 3 Ch. Ap. 679.

(4) L. R. 2 Eq. 524.

1876.
SHEPHERD
v.
THE TRUS-
TEES OF THE
PORT OF
BOMBAY.

tain agreement between railway companies, as to dividing proceeds of through traffic, had a certain construction, or that, if a different construction ought to be given to it, it would be *ultra vires* of the company making such contract. There can, I think, be no doubt that, if the Port Trustees or any other corporation or public company in Bombay were to do or attempt to do any act in excess of their powers, as contained in the charter or legislative act from which they derive their being, and such act would be injurious to the rights of property of an individual, such individual would, on general principles, have a right to the protection of this Court by injunction or other appropriate relief. In none of the cases, however, that I have been able to find, has the protection of a Court of Equity, by way of injunction, in case of an assumption by an incorporated body of powers beyond those conferred upon it, been granted at the suit of an individual, except where such individual has been damaged by such excess of power in respect of his rights of ownership, or rights of commodity or easement, which for this purpose are treated as analogous to rights of ownership strictly so called. No kind of authority has been cited that an individual is entitled to protection by way of injunction against the act of a corporation, though in excess of their powers, which affects that individual's character and reputation, whether private, professional, or commercial, which he would not have been entitled to had the act complained of been committed by an individual defendant, on the ground that the act in question was one which the corporation had no power to do under the instrument of incorporation.

Even had I felt no doubt that the right to an injunction in a suit by an individual to restrain the acts of a corporation as being *ultra vires* exists, where the right of the individual alleged to have been infringed had been of character or reputation, I should in the present case have been unable to come to the conclusion that the resolutions in question were, in fact, *ultra vires*. The Act expressly gives the Trustees power to transact certain kinds of business, to hold meetings at which questions coming before them for decision are to be decided by a majority of votes, and such decision is by the Act termed a resolution. They not only have the power, but are bound to draw up and enter in a book minutes of the proceedings of their meeting; and a copy of such minutes, when signed by the president,

they are bound to transmit to the local Government. It must therefore be, not the *form* of the proceedings of the Trustees now complained of, but the *contents* of their resolution, which is to be held to be *ultra* their powers. Among the other business the Trustees have by their Act power to transact, are—the management and administration of considerable property; the receipt of rents, tolls, fees and dues; the acquisition, leasing, and selling of immoveable or moveable property; the construction of works, such as wharves, quays, docks, &c.; the appointment and removal for misconduct of officers and servants of the corporation other than certain specified officers. Now in such cases as a question of removing an officer or servant for alleged misconduct, or terminating the further prosecution of a contract to execute works, on the ground of breach by the contractor of any expressed or implied obligation, and many other cases which may be conceived, it will be necessary to discuss the conduct of an *employé* of the corporation, or one having dealings with them. The only way in which such discussion can take place is at a meeting of the Trustees, of the proceedings of which minutes are to be taken, signed, and transmitted. Can it be seriously contended that the Trustees have the power to discharge an *employé* for misconduct, or put an end to a contract on the ground of a breach of duty of the contractor, but not to record the cause of dismissal, or of the termination of the contract, because by so doing they may affect injuriously the character of individuals? It is not, of course, necessary to consider the question of the Trustees passing and recording a defamatory resolution wholly unconnected with any business which they have power to transact, as that is not the case with which we have to do here. But, in my opinion, the Trustees have, as much as any private individual, the *power* to record their decisions and opinions with regard to matters connected with the business they have, under their Act, power to transact—whether such decisions or opinions are confined to statements of what they believe to be actual facts, or extend also to the giving of advice for the conduct of successors in office with regard to such business—and whether the expression of such decisions, opinions, or advice may or may not contain statements injurious to the character or reputation of others. Of course they *may* by their expressions of a decision, opinion, or advice, if published, render themselves liable to a suit for damages on

1876.

SHEPHERD
v.
THE TRUSTEES OF THE
PORT OF
BOMBAY.

1876. account of defamation, that is another and distinct question; but, in my opinion, they have the *powers*, in any matter connected with or arising out of the business they are empowered to transact, to express a decision, opinion, or advice for the guidance in the future of themselves and their successors, though it may be prejudicial to the characters of others. For these reasons I am of opinion that the resolutions in question, whether well founded or not, whether warranted or wholly unwarranted by anything which the plaintiff had done or omitted to do, and whether or not rendering the Trustees liable to pay damages, were acts *intra vires* of the Port Trustees as being connected with business which it is not disputed they had powers to transact, viz., the hiring and possible sale of their steamer, the "Dromedary," and as being an expression of an opinion or advice, whether right or wrong, for the guidance of their successors in office. Taking, as I do, this view of the question on the point made as to the resolution being *ultra vires*, I must hold that the basis of the argument of the learned counsel for the plaintiff in support of his application for this injunction wholly fails.

Though the conclusions at which I have already arrived are sufficient for the disposal of this application, I may add a few observations on what appears to me the strange character of the order the Court is asked to make. It is asked in effect to order the minute book of proceedings of the Trustees to be altered by erasing or cancelling the resolutions complained of, unless the Trustees will pass and have signed and transmitted to Government a resolution rescinding them. As for the alternative of passing a rescinding resolution, that is a matter which it would be impossible for the Court to order directly. A resolution of a board is the form in which their view of facts or opinion of what ought to be done is embodied. To order the defendants in the present case to pass a resolution rescinding the resolutions of the 10th and 17th February, would be nothing less than to order them to form a certain opinion at variance with one which they have already expressed, or to express one which they do not hold. How can any Court be asked to pass such an order? Taking the other alternative, viz., that of erasing or cancelling the resolutions complained of, it is, no doubt, a matter the Court has power to

order in an indirect way. But the granting of an order in effect mandatory, though framed in words in form prohibitive only, is an exercise of a jurisdiction which the Court is generally very unwilling to resort to on an interlocutory application. It may, no doubt, be done, though in the case cited by the learned counsel for the plaintiff as an authority, *The Great North of England Railway v. The Clarence Railway* (1), the opinion of the Vice-Chancellor, in the first instance in favour, in the peculiar circumstances of the case, of making the order sought, was afterwards withdrawn by him, and on reference to the Lord Chancellor the order was refused. To induce the Court to depart from the leading principle that the object of an injunction is to prevent future injury, leaving matters as far as possible *in statu quo* till the suit in all its bearings can be heard and determined, at any rate some strong case of substantial damage to the plaintiff which would arise from simply allowing things to remain *in statu quo* must be made out. Now what in the present case is the suggestion of substantial damage to the plaintiff? It is suggested that his present and future business relations as a contractor with the local Government will be prejudiced and endangered, and thereby irreparable damage will or may be done. I cannot understand what foundation there is for such a suggestion. There might, perhaps, have been some ground for it had the plaintiff been in time with his proceedings to ask to intercept the transmission of the resolutions to Government. But they had already been transmitted before the suit was filed, any damage which could thereby ensue to the plaintiff had been done, and I cannot conceive how such damage, if any there was, could be remedied or prevented by an interlocutory order of this Court, resisted by the defendants the Trustees, for running a pen through certain resolutions as recorded in their minute book. The only effect of making such an order, if it had any effect at all in the quarter where the plaintiff apprehends prejudice will be created against him by the recorded opinions of the defendants, would have been to produce a suspension of opinion till the whole matter shall have been sifted and heard out. But exactly the same effect would, I should

1876.
SHEPHERD
v.
THE TRUS-
TEES OF THE
PORT OF
BOMBAY,

(1) 1 Coll. 507.

1876
REG.
v.
RAHIMAT.

scattered provisions in the Penal and Criminal Procedure Codes, especially Sections 213 and 214 of the former and Sections 188 and 210 of the latter. Section 188 of the Criminal Procedure Code pre-supposes the offences which may lawfully be compounded, and provides that the compounding may be effected out of Court, or in Court with the permission of the Court. It also provides that the effect of such compounding shall be the acquittal of the accused person. In Section 210 the Legislature invests Magistrates with a discretion to permit on sufficient grounds the withdrawal of complaints in "summons cases." In the Penal Code, Sections 213 and 214 enact a general rule on the subject, declaring all offences non-compoundable, except those mentioned in the exception to Section 214, which runs thus:—

"The provisions of Sections 213 and 214 do not extend to any case in which the offence consists only of an act irrespective of the intention of the offender, and for which act the person injured may bring a civil action."

It is clear, therefore, that, in order that the exception may operate, two conditions must combine. The first is the immateriality of the offender's intention accompanying the act constituting the offence; and the second is the possibility of a civil action by the person injured. We are thus led to the consideration of the question "what is the precise meaning to be attached to these conditions?" Seeking the help of the English law we find it laid down in *Keir v. Leeman* (1) that "the law will permit a compromise of all offences, though made the subject of a criminal prosecution, for which offences the injured party might recover damages in an action." And, again, in the same case, in error (2) that this proposition should be limited to the "cases where the private rights of the injured party are made the subject of agreement, and where by the previous conviction of the defendant the rights of the public are also preserved inviolate."

In order to be able properly to understand the first condition we must assume the Legislature to have made two classes of offences; one involving the commission of an act, which becomes criminal only by the intention of the offender being superadded; the other

(1) 6 Q. B. 308; S. C. 13 L. J. Q. B. 359.

(2) 9 Q. B. 371; S. C. 15 L. J. Q. B. 360.

in which such intention is not essential to constitute the criminality of the act. To establish the former class of offences only the prosecution would have to prove the intention. The use of the words "voluntarily," "intentionally," &c., would point to such a distinction. See Sections 39 and 322 of the Penal Code. Amongst the class of offences in which, the act being proved, the intention is implied, are generally offences under Chapters 6 and 7 of the Penal Code, viz., offences against the State and those relating to the Army and Navy; while offences under Chapters 8 and 13, viz., offences against public tranquillity and offences relating to weights and measures, fall in the other class.

1876
REG.
v.
RAHIMAT.

The illustrations to the exception to Section 214 of the Penal Code, though they do not throw much light on the intention of the Legislature, support this view. The word "assaults" in Illustration (b) is not used as defined in Section 351. This is clear when it is read with Illustration (a). The offence of bigamy, mentioned in Illustration (c), is one irrespective of the offender's intention; but, as it cannot become the subject of a civil action, it cannot be compounded. The offence of adultery satisfies both the conditions, and the Legislature, therefore, declares it to be compoundable.

Next, going to decided cases, we find that the Madras High Court would not permit the withdrawal of a case of dishonest misappropriation of property on the ground that the dishonest intent was a necessary ingredient of the offence (1). Again, the High Court of Bengal in *Reg. v. Gopee Mohun Mitter* (2) allowed a complaint of kidnapping to be compounded, because "the offence, of which the accused has been convicted, is simply kidnapping as punishable under Section 363, and it has not been found that there was an intention to commit any further offence," and because a civil action could be brought. This High Court has, apparently, taken a different view in *Reg. v. Jethá Bhulá* (3), but without assigning any reasons.

The present case is one of grievous hurt, which does not satisfy both the conditions of the exceptions, and cannot, therefore, be compounded.

(1) 9 Mad. Jur. 341.

(2) 22 Calc. W. R. 26 Cr. Rul.

(3) 10 Bom. H. C. Rep. 68.

1876
REG.
v.
RAHIMAT.

Shántárám Náráyan, as *amicus curiæ*, *contra*.:—The exception to Section 214 should be construed by the light of the illustrations. Illustration (b) declares the offence of assault to be compoundable. This offence is defined in Section 351, which expressly speaks of the offender's intention. Sections 6 and 7 of the Penal Code make it necessary that the word "assault" should be understood only in the sense given to it by Section 351. The offence of adultery is not aggravated by any particular intent, and could be properly compounded. Rape could not be compounded, because no civil action could be brought in respect to it. Mr. Mayne in a note to Section 214 quotes a case from 3 R. C. C. S. C. 14 and another from 4 R. J. and P. 171, which show that house-trespass was held not compoundable, though wrongful restraint was.

Cur. adv. vult.

The judgment of the Court was delivered by

WEST, J.:—Section 188 of the Code of Criminal Procedure says that "in the case of offences which may lawfully be compounded, injured persons may compound the offence out of Court or in Court with the permission of the Court," and that "such withdrawal from the prosecution shall have the effect of an acquittal of the accused person." The case before us is one in which an accusation of voluntarily causing grievous hurt has been compounded with the permission of the Court; and the question is, whether this is a case of an offence "which may lawfully be compounded."

The remedies provided by the law for wrongs which it recognizes as affording a proper ground for the exercise of the State's coercitive power, may be classed generally as criminal and civil. The latter apply properly to wrongs not regarded as so flagrant and so dangerous to society at large as to call for the spontaneous interference of the State. The general well-being of the community is sufficiently protected by the exercise of power at the desire of the person injured, and on proof of the wrong. The object is in theory not penal, but remedial or compensatory.

Criminal sanctions, on the other hand, are intended to enforce duties regarded as of such importance to the community that

the option of insisting on them, or of bringing the provided penalty to bear in cases of their infringement, cannot safely be left in the hands of private persons. In such cases the State, through its representatives, steps in either on a denunciation duly made, or of its own accord, to bring the wrong-doer to justice; and it regards this object as one of such paramount importance that it will not allow any purely remedial arrangement between the person injured and his injurer, by which the punishment prescribed for the latter may be avoided.

1876
REG.
v.
RAHIMAT.

The views taken, however, at different times and under different influences, of the enormity of particular wrongs vary widely; and there are wrongs which, while they fall within the same general description, may, according to circumstances, be of an extremely pernicious, or of but a slightly pernicious, tendency. They may endanger the welfare of society, or they may affect, except in some inappreciable degree, only the interests of an individual. Hence there comes to be recognized a class of cases which may be the subjects either of criminal or civil cognizance. If the person injured desires to obtain compensation, the law does not forbid him; if he invokes the penal interposition of the Magistrate, that interposition is not refused.

Full competence to accept satisfaction for wrongs done to oneself follows necessarily from the general rule of freedom of transactions. That rule, however, and the deduction from it, are subject to limitations in the interest of the community through which some compromises of offences are made penal, and others are so disapproved that the Courts will not give effect to them. These limitations correspond generally to the classes of wrongs for which, though a personal injury has been sustained, a civil suit is not allowed, or is allowed only after the public interest has been satisfied by a prosecution, the instituting of which is by the British Indian, as by the English, law regarded as a duty resting on the person injured, and one which he is not at liberty to neglect in consideration of any advantage to himself.

Sections 213 and 214 of the Indian Penal Code are intended to prevent the suppression of prosecutions in cases in which the public is thought to be deeply interested in the punishment of the offender. They impose penalties on transactions entered into

1876
 REG.
 v.
 RAHMAT.

with this view. But after the rules have been laid down in terms extending to all compromises of offences, an exception is made that "the provisions of Sections 213 and 214 do not extend to any case in which the offence consists only of an act irrespective of the intention of the offender, and for which act the person injured may bring a civil action." The words "may bring a civil action" seem to mean "may bring an action without, or instead of, instituting criminal proceedings." On the principle of "*ubi jus ibi remedium*" there are but few, if any, violations of right recognized by the law as occasioning personal injury, for which, when the demands of criminal justice have been satisfied, a civil action may not be brought by the person injured; and the condition of a civil action being competent to the party injured after a prosecution could not have been intended where the design is to define and circumscribe the bounds within which private compromises of offences are permissible. The graver the injury in such cases, so long as the injured person survives, the better founded the claim for civil reparation. Where the law allows a choice between the criminal and the civil remedy, the exception says that a compromise shall not be penal by which the person injured obtains what civil proceedings would give him. The taking and giving of a compensation which the law forbids, instead of a criminal prosecution, is the gist of the offences in Sections 213 and 214; but where the law would itself award a compensation, the exception allows the compromise.

The condition thus construed at once cuts down the cases in which compounding is not penal to a limited class. Unless a "suit of a civil nature," according to Section 1 of the Code of Civil Procedure, can be maintained in the first instance by the person injured against the injurer, they are not at liberty to enter into a transaction by way of compromise. They are subject to the penalties of Sections 213 and 214 of the Indian Penal Code should they attempt thus to defeat its purpose. In all the more serious cases of wrong-doing by which personal injury is sustained, no such action could, according to the recognized principles of the English law, be maintained. The criminal law, wherever those principles are accepted, must first be put in motion, before civil redress for the private wrong can be effectually sought. That these principles were accepted at least generally, by the Legislature when it passed

the Penal Code, is, we think, sufficiently apparent from the test it has provided; and according to these it is only in cases comparatively trivial—at least, of trivial importance to the community at large—that an action can be brought without a prior prosecution. In no others is a compromise free from the penalties prescribed by Sections 213 and 214 of the Indian Penal Code.

1876

 REG.
 v.
 RAHIMAT.

The other condition, that the “offence consists only of an act irrespective of the intention,” seems to have the same general purpose of confining compromises to the cases of almost venial offences. The words “irrespective of the intention” seem to mean that the definition of the offence extends only to acts, not to a particular intention prompting or accompanying the acts. Thus the several instances of negligence constituting an offence without a positively mischievous purpose, are cases in which the “offence consists only of an act.” No intention is, or needs be, imputed as an element of the offence. In other cases the act—as, for instance, waging war against the Queen, or committing adultery—though it may be essentially voluntary, is still conceived, for the purpose of the definition or of the imposition of punishment, simply as an act. If the act, as thus viewed by the Legislature, is done, the offence is committed, and the penalty is incurred “irrespective of the intention of the offender.” In all cases of this kind for which the Indian Penal Code provides, the act is either one, as negligently allowing a prisoner charged with, or convicted of, an offence to escape, for which no civil action could be brought, and on that ground excluded from the operation of the exception: or else, as in the case of adultery, of a kind regarded as of a specially personal character, so that the public peace and welfare will be rather furthered than impaired by allowing a private settlement of the wrong.

In contrast to these cases stand the great mass of offences which arise in the ordinary course of affairs. In the definitions or descriptions of these in the Penal Code the intention is an essential element. The mere act, not perhaps in itself, but as viewed by the Legislature, is regarded as possibly ambiguous, and is not an “offence irrespective of the intention of the offender” according to a distinction well expressed by Lord Mansfield, C. J., in the case of *R. v. Shipley* (1). Thus, in cases of theft, personal

(1) 4 Dong. p. 165.

1876
RFG.
v.
RAHIM ET.

violence, threats, and defamation, the physical act must spring from a dishonest or malicious intent in order to constitute an offence. This was the class of cases which probably was most conspicuous to the Legislature when the exception to Section 214 was made law. The offences are of a kind regarded as highly dangerous to society, and not, therefore, proper subjects of compromise. As their definitions involve intention, they were excluded from the exception by limiting it to cases of offences constituted by "acts irrespective of the intention of the offender."

The result appears to be that whenever the words "voluntarily," "intentionally," "fraudulently," "dishonestly," or others, whose definition involves a particular intention, enter along with a specified act into the description of an offence, the offence, not being one "irrespective of the intention," is not one which the exception to Section 214 of the Indian Penal Code by itself allows to be compounded without the parties incurring the penalties prescribed by that and the next preceding section. The offence, to admit of compromise, must be one in this sense irrespective of the intention; and it must be one for which a civil action may be brought at the option of the person injured, instead of criminal proceedings.

This construction of the exception does not, indeed, clear away all difficulties. It seems anomalous that, while adultery, through its definition not including any statement of intention as an element of the offence, may be compounded, enticing a woman away with intent to commit adultery with her may not be compounded. The anomaly may, perhaps, be explained by the circumstance that mere adultery may be a wholly private transaction, which the husband may hope to keep secret, while enticing a woman away, necessarily involves a public scandal; but, such as it is, it is in a measure corrected by the provisions of the Code of Criminal Procedure (Sections 478, 479), which make the prosecution of the offender in the one case, as in the other, dependent on the will of the husband. The attempt to compress a principle gathered from a great number of instances within a few words generally, leaves some cases not provided for in a quite satisfactory way; and the existence of such cases is not a sufficient argument against a particular construction, unless some other can be suggested which gets rid of all difficulties.

The illustrations to the exception, so far from throwing light on its meaning, create the chief difficulties in its construction. Illustrations (a) and (b) taken together, if we take "assault," as Section 7 bids us do, in the sense defined by Section 351, suggest that the true sense of the exception is to allow compounding in every case that might be the subject of a civil action, except where the act constituting an offence is made a graver offence by some intention accompanying it, which is not involved in the definition of the minor offence, which the act would *prima facie* amount to. The condition that, for the exception to operate, the act must be one for which a civil action might be brought before taking criminal proceedings, would, on this construction, as on the other, cut down the possible cases of compromise to a small number where the principles of the English law on this subject prevail; but, allowing this, the difficulty remains that the suggested construction is one that is not by any ingenuity to be gathered from the language of the exception itself. If we take "assault" in its defined sense, it is not an offence constituted by "an act irrespective of the intention." The physical act being the same in both cases, the intention accompanying it might make it an assault under Section 351, or an attempt to commit murder under Sections 511, 299, and 300 of the Indian Penal Code; and there is not, in any of the cases in which intention enters into the definition of an offence in that Code, such an inseparable connexion of a particular intent with a particular act, that such intent is to be conclusively inferred from it; otherwise the intention would not be specified as part of the definition. But if the act thus derives all its criminal character from the particular intent accompanying it, it cannot be said that a minor offence is constituted by the act irrespective of the intention, while a major offence is constituted by a similar act along with some different or additional intention. There is no offence at all until there is a criminal intention; and when this accompanies the act, it at once determines the character of the offence, be it graver or more venial.

The illustrations to the Penal Code rank as cases decided upon its provisions by the highest authority. But as every authority may sometimes err, we are justified in asking whether this may have happened in the present instance. Illustration (b) says:—
 "A assaults B. Here, as the offence consists simply of the act

1876
 REG.
 v.
 RAHIMAT. irrespective of the intention of the offender, &c.” This conception of the meaning of assault is obviously quite at variance with that which governed its definition in Section 351 (1). The Legislature conceived of assault as consisting, as viewed by the law, in some mere act. In Illustration (a) an intention is superadded to this act, so that an attempt to commit murder is constituted an offence consisting by its definition of an act *plus* an intention, and thus not within the exception according to the construction which we have preferred. Illustrations (c) and (d) are equally reconcilable with either interpretation.

Amongst the cases actually decided on the exception there is one at 9 Madras Jurist 341, in which it was ruled that a charge of dishonest appropriation under Section 404 of the Indian Penal Code could not legally be compounded. In the case cited from 3 Rev. Civ. and Cri. R., 14 S. C. Ct. References, a compromise in a case of wrongful restraint was successfully sued on; but wrongful restraint being punishable with but one month's imprisonment, a withdrawal from the prosecution is expressly allowed by Section 210 of the Code of Criminal Procedure; and as Section 188 of that Code cannot but have been meant to have some operation, an agreement for such withdrawal could not be illegal. The case at 22 Calc. W. R., 26 Cr. Rul., was one of kidnapping and the Court held that it would be lawfully compounded. Ainslie, J., seems to have inclined to the view that this was allowable, because there was not an intention to commit an offence beyond that of simple kidnapping, and because a civil action might be maintained, but it does not appear that the obvious grammatical construction of the exception had been considered by him. Kidnapping, though a voluntary act, is not, according to its definition in the Penal Code, composed of an act *plus* an intention, but of an act alone. It is, though necessarily involving an intention, conceived of and dealt with by the Legislature as a mere act; and being thus an offence irrespective of the intention would, according to our view, admit of a compromise if the second condition were satisfied, namely, that a civil action might be maintained for the wrong by the injured person. It is not certain from the language of Ainslie, J., that this was not his view also; but, if not, the decision is, we think,

• (1) See the observations of Turner, J., in *Reg. v. Mudan Mohun*
 (6 N. W. P. II. C. R. at p. 305).

to be sustained where a civil suit is admitted, independently of the reasons given for it.

1876

REG.

P.
RAHIMAT.

The case of *Jethú Bhalá*, at 10 Bom. II. C. Rep. 68, is more distinctly against what we think the correct construction. But no reasons are given for that decision, and the case does not appear to have been argued. If the offence of voluntarily causing hurt may be compounded, so apparently might causing grievous hurt, or even an attempt to commit murder. For the mere act and the personal injury sustained from it, apart from any special criminal intent, the person injured might, in each case, maintain a civil action; and there would not in either be an aggravating intention placing the offence in a graver category than that to which it would ordinarily belong. If the act was thought to include the intention ordinarily accompanying it, and thus in a manner to be one, in the eye of the law, irrespective of the intention, we do not think that such a construction is admissible in any case in which the Legislature has expressly made a particular intention part of the definition of an offence. It may be easy to infer the motive in any ordinary case from the act and the circumstances but that the inference was not intended to be a necessary and conclusive one, is clear from the specification of the intention in defining the offence. We think, therefore, that that case was not rightly decided, and that an offence, in the definition of which a particular intention is included, cannot be compromised legally, or without incurring a penalty, except in the petty cases provided for by Section 210 of the Code of Criminal Procedure. If the intention does not enter into the definition of the offence, it may be compounded in all cases in which a proceeding by way of civil action, instead of a criminal prosecution, would be competent to the person injured.

The offence of voluntarily causing grievous hurt is, accordingly one which cannot legally be compounded. The Magistrate's order of dismissal must, therefore, be reversed as contrary to law. Whether he will, under the circumstances, now proceed any further with the case, is a matter which must be left to his discretion. He will probably not feel called on to take any step, by which the expectation naturally raised by his previous disposal of the case would be disappointed.

1876
R.F.G.
P.
RAHIMAT.

The difficulty we have had in dealing with this case, and which seems to be inherent in the law as it now stands, is one that, in our opinion, calls for the action of the Legislature.

Order accordingly.

Note.—In conformity with this ruling, the following offences were held not compoundable :—

(a) Criminal Breach of Trust. *Reg. v. Lakshman Shenan Gabji*, 24th February 1876.

(b) Cheating. *Reg. v. Lakhu Sadashiv*, 24th February 1876.

(c) Defamation. *Reg. v. Nutty*, 8th March 1876.

(d) Enticing away a woman. *Reg. v. Jethá Chabru*, 30th March 1876.

In addition to the authorities cited in the present case, *Reg. v. Mudan Mohun* (6 N W P. II. C. R. 302) may be referred to, in which it was held that the offence of voluntarily causing grievous hurt was not compoundable. See also the ruling 7 Mad. H. C. Rep. XXXIV, in which it is laid down that dishonest misappropriation of property is not compoundable.

[ORIGINAL CIVIL JURISDICTION.]

Suit No. 1018 of 1867.

Appeal No. 290.

March 4. SUMÁR AHMED AND OTHERS (ORIGINAL DEFENDANTS) APPELLANTS v.
HÁJI ISMAIL HÁJI HABIB (ORIGINAL PLAINTIFF) RESPONDENT.

Practice—Account—Commissioner's Report—Motion to discharge or vary—Affidavit—Memorandum of Objections—Decree—Construction—Notes of Judgment in Deputy Registrar's Book.

In moving to discharge or vary the report of the Commissioner for taking accounts, the right practice is to move on a memorandum of objections filed in the Prothonotary's office, and upon the evidence taken by, and the proceedings before, the Commissioner, and not on affidavits made for the purpose of the motion. In such a motion, affidavits should only be filed (a) when ordered by the Court, if it desire fresh evidence; (b) by special leave of the Court for the purpose of advancing a fact which does not appear on the face of the proceedings before the Commissioner.

A note of the judgment of the Court taken by a Deputy Registrar cannot be consulted for the purpose of explaining or aiding in the construction of a decree. Where, therefore, a decree was, on the face of it, an ordinary decree in a partnership suit, for the taking of the accounts between the partners in the

usual way, the Court refused to allow the respondent to show, by reference to such a note, that what the decree meant was that he was to be credited and his partners debited with certain payments *in toto*, and not with their respective shares only.

1876
 SUMA'R
 AHMED AND
 OTHERS
 v.
 HAJI ISMA'IL
 HAJI HABIB.

THE plaintiff and defendants were members of two partnerships: one, known as "the office account partnership," to carry on the business of guarantee-brokers; the other, known as "the *Jethá* partnership," for the purpose of dealing in shares. In 1867 the plaintiff filed a suit to take a general partnership account of both partnerships. The suit was heard by Arnould, J., who on 14th September 1868 passed a decree referring it to C. E. Fox as Commissioner to take an account of all the several co-partnership dealings and transactions respectively between the plaintiff and the defendants in respect of the two partnerships—as to the office account partnership from 20th October 1865; as to the *Jethá* partnership from 30th October 1864—and the Commissioner was ordered to report with all convenient despatch what balance, if any, was due from either of them the plaintiff or defendants to the others of them after making all just allowances. From this decree the defendants appealed, and the Appellate Court varied the decree of the Court of first instance in several particulars not necessary to be noticed here, and by directing that as to the accounts of the office account partnership, the same should be taken from 18th November 1866, with liberty for the appellants to show that a sum of Rs. 58,950-3-58, being the sum found due as of the last-mentioned date on adjusting as between the appellants and the respondent the accounts between the partnership and the firm of Messrs. Blackwell & Co., did not include the indent account of the partnership with Messrs. Blackwell & Co., and with liberty for the respondent to prove any payments made by him in respect of the debts or liabilities of the office account partnership since 18th November 1866, and which said payments were to be allowed to the respondent in taking the last-mentioned account.

Both the appellants and the respondents had, subsequently to 18th November 1866, made certain payments in full satisfaction of certain claims against the office account partnership. At the taking of the accounts before the Commissioner the respondent alleged that the appellants at the date of the adjustment had

1876
 SUMA'R
 AHMED AND
 OTHERS
 v
 HAJI ISMA'IL
 HAJI HABIB

undertaken to make all these payments, and that the proper construction of the decree of the Appellate Court was that, as regards the payments made by the respondent, he was to be allowed credit for the full amount paid by him, and not only for the amount paid in excess of his share in the liabilities of the partnership, while that, as regards the payments made by the appellants, they were entitled to no credit at all as against the respondent. The Commissioner, to assist him in construing the decree, read a note of the judgment of the Appellate Court, said by the respondent to have been taken by a Deputy Registrar at the time judgment was delivered, and also a fuller note, written on the opposite page of the same book, by a clerk in the Prothonotary's office, and said by the respondent to have been compiled from the original notes of Sir R. Couch, the Senior Judge of the Appellate Court; the original notes of Sir R. Couch, however, were not forthcoming. After so reading the notes in the Deputy Registrar's book, the Commissioner decided that the respondent's contention was correct, and ultimately made his report, in accordance with such decision, on 21st December 1874.

The appellants thereupon obtained a rule *nisi* to discharge or vary the report of the Commissioner. At the argument of the rule before Bayley, J., the learned Judge held that the notes in the Deputy Registrar's book might be read for the purpose of construing the decree of the Appellate Court, and having read them, held that the Commissioner's decision was right, and by his order of 1st May 1875 disallowed all the appellant's objections on this point.

The appellants appealed from this order, and the appeal was heard by WESTROPP, C.J., and GREEN, J., on 3rd and 4th March 1876.

At the hearing of the appeal it appeared that a practice had, of late years, sprung up that, when a party desired to discharge or vary the report of the Commissioner, he obtained a rule *nisi* for this purpose, supported by affidavits stating the grounds of his objection to the report. Other affidavits in reply and rejoinder were then filed on either side, which were used at the final argument of the rule.

[WESTROPP, C.J.:—The practice is quite irregular. Such affidavits ought not to be filed without the leave of the Court. The

objections to the report ought to be decided by the Court on the same evidence as was before the Commissioner. If the affidavits contain any fresh evidence regarding the items in the account, which was not adduced before the Commissioner, the Court should not look at them. If, on the other hand, the affidavits contain no fresh evidence, but only repeat that which has already been taken by the Commissioner, they are unnecessary. Of course, if the Court requires any fresh evidence, it can, if it see fit so to do, examine witnesses or call for an affidavit; or, if the parties wish to advance a fact, which does not appear on the face of the proceedings before the Commissioner, they may, on showing proper grounds, obtain the leave of the Court to file an affidavit for that purpose; but otherwise, under ordinary circumstances, the parties should move to vary the Commissioner's report on a memorandum of objections filed in the Prothonotary's office, and upon the evidence which was before the Commissioner. Ordinarily, affidavits would be only a useless addition to the expense of the proceedings. The application to vary the report should be made within the twenty days required by Rule VI. of Chapter VI. at p. 52 of the High Court Rules.]

Inverarity and Hart for the appellants:—The Commissioner and the learned Judge whose order is now appealed against, were wrong in looking at the notes in the Deputy Registrar's book for the purpose of construing the decree. They were not even the notes of a Judge, and there is nothing to show that they were correct, or that any part of them was written at the time that the judgment was delivered. The decree ought to be construed according to its terms. It is, on the face of it, an ordinary decree for the taking of a partnership account, and the Court will not, unless constrained to do so by the clear and express words of the decree itself, put so extraordinary a construction on it as that for which the respondent contends. There is nothing in the decree of Arnould, J., or of the Appellate Court, to show that the appellants ever undertook to pay the whole of the partnership liabilities; but, had either Court found that there was such an undertaking, it would infallibly have inserted in its decree some provision binding the appellants to that extent. There is, however, nothing in either decree to deprive the appellants of their position as partners. They are, therefore, entitled to debit the respondent with his share of the payments made

1876
SUMA'R
AHMED AND
OTHERS
Haji Ismail
Haji Habib.

1876
 SUMAIR
 AHMED AND
 OTHERS
 v.
 HAJI ISMAIL
 HAJI HABIB

by them, and to be themselves debited with only their own shares of the payments made by him.

Marriott, Advocate-General (Acting), and *Latham* for the respondent:—The notes on which we rely, are not only those of the Deputy Registrar, a sworn officer of the Court, presumably taken by him, in discharge of his ordinary duty, in Court at the time of the delivery of the judgment, but also a copy of the notes of Sir R. Couch himself. The fact of the adjustment of accounts at which the appellants undertook all the liabilities of the partnership has never been disputed to this day, but only its effect in law. If the account is to be taken as an ordinary partnership account, the provision in the decree as to allowing the respondent the payments made by him is meaningless. On the other hand, there is no direction that the appellants are to be allowed any credit for the payments made by the m.

WESTROPP, C. J.:—It is not alleged on behalf of the respondent that there is a substantial error in the decree of the Appellate Court. If there be such an error occasioned by the fault of the officer in drawing up the decree, the proper remedy, after the decree has been sealed, is review. But it is said that by comparing that decree with the notes of the Deputy Registrar, or with an alleged copy of, or extract from, the notes of Sir R. Couch, we shall perceive that the decree means something more than it now appears to us to do. That something more, however, is, in fact, a most important variation from the decree now before us. We think we cannot look at the notes of the Deputy Registrar, or those said but not proved to have been taken from the book of Sir R. Couch for the purpose of construing the decree of the Appellate Court. That decree should be construed as it stands, without any reference to those notes. We do not say that we might not refer to such notes on a motion to amend a clerical error in the decree; but that is not what we are now asked to do, and we do not think that we can refer to them at all to explain or to aid us in construing the decree. *Hirji Jina v. Naran Mulji* (1) we declined to be bound

(1) 1 Ind. L. R. (Bombay) I. In that case the Court, for the purpose of rectifying a clerical error in the decree, referred to notes of the judgment taken by the Judge himself, by the counsel engaged in the cause, and by a short-hand writer.

by a Judge's explanation of his own decree, and held that we must construe the decree as we found it, and that if it were equally susceptible of two constructions, of which one rendered it in accordance with law, and the other did not, we should give it the former. These notes cannot stand upon higher ground than the explanation of the learned Judge himself. We must, therefore, refuse to look at the notes, and limit ourselves to the decree. Being so limited to the decree, we find it to be one for the taking of a partnership account in the ordinary way. The terms of the adjustment now relied on by the respondent are not set up by him in his plaint, nor is any mention of them made either in the decree of Arnould, J., or in that of the Appellate Court. What the respondent now contends for is, in fact, so complete a departure from the ordinary law of partnership that we cannot presume that to have been what the decree meant, unless it distinctly says so, but what the decree of the Appellate Court on the face of it orders, is the taking of an ordinary partnership account. The specific mention of the credit to be allowed to the respondent seems to us to be sufficiently accounted for from the fact that it was probable that he had paid a larger sum, under pressure of the law, that Rs. 58,950-3-58 when he paid in full the claims of certain creditor against the partnership, and it was to prevent any disputes on this ground that the specific direction as to the credit to be given to the respondent was inserted in the decree of the Appellate Court. The appellants are responsible for their shares only, under the terms of the partnership, in the sums paid by the respondent to the creditors of the partnership since 18th November 1866, and are to be credited with the respondent's share in the sums paid by them to the creditors of the partnership since the same date.

1876

SUMAIR
AHMED AND
OTHERS
v.
HAJI ISMAIL
HAJI HABIB.

[APPELLATE CIVIL JURISDICTION.]

Special Appeal No. 464 of 1874.

1876
March 22.

YAMUNÁBÁI, WIFE OF NÁRÁYAN MORESHVAR PENDSE, AND NÁRÁYAN JAGANATH BHIDE (ORIGINAL DEFENDANTS) SPECIAL APPELLANT *v.* NÁRÁYAN MORESHVAR PENDSE (ORIGINAL PLAINTIFF) SPECIAL RESPONDENT.

Husband and Wife—Restitution of conjugal rights—Cruelty.

In a suit by a Hindu husband against his wife for the restitution of conjugal rights, the criterion of legal cruelty, justifying the wife's desertion, is the same in this country as in England, viz., whether there has been actual violence of such a character as to endanger personal health or safety, or whether there is the reasonable apprehension of it.

Every person who receives a married woman into his house, and suffers her to continue there after he has received notice from the husband not to harbour her, is liable to an action for damages or injunction, unless the husband has, by his cruelty or misconduct, forfeited his marital rights, or has turned his wife out of doors, or has by some insult, or ill-treatment, compelled her to leave him.

Seemle that a decree for restitution of conjugal rights between Muhammadans or Hindus may be enforced under Section 200 of Act VIII of 1859.

THIS was a special appeal from the decision of Edward Cordeaux, Assistant Judge of the District of Poona, confirming, except as regards the award of costs, the decree of Rámchandra Janardan, Joint Subordinate Judge at Poona.

The plaintiff sued for the restitution of conjugal rights and to recover possession of his wife, the first defendant, from the second defendant, alleging that the first defendant was living at the second defendant's house, and that, when the plaintiff on the morning of the 28th of February 1873 demanded his wife, the first defendant refused to return to him, and the second defendant refused to give her up.

The written statement of the first defendant was to the effect that the plaintiff was a man of unsound mind, unable to earn a livelihood, and incapable of taking care of her or his property; that after the death of her father the first defendant, with the consent of her mother-in-law, went to live at the house of the second defendant who was a relative of the plaintiff, and that the plaintiff and his mother were also to have afterwards come to reside in the second defend-

ant's house, but before they did so the plaintiff's mother died; that the first defendant was willing to live with her husband, but not in his house, as he was unable to protect her against the intrigues of his relatives living in the same house, Rámchandra and Krishnáji, with whom she could not live with honour and decency, and who should be made parties to the suit; and that she, therefore, refused to go with her husband on the day mentioned in the plaint.

1876
YAMUNA'BA'I
AND
NA'RA'YAN
JAGANNATH
BHIDE
v.
NA'RA'YAN
MORPESHAH
PENDE.

The second defendant answered nearly as above, and added that he did not object to the first defendant going to her husband's house, but merely prevented force being used to compel her to do so.

The Subordinate Judge gave the plaintiff a decree directing the second defendant to deliver up the first defendant to her husband, and to bear all the costs of the suit.

The Appellate Court affirmed that decree, but varied the order as to costs.

The special appeal was heard by MELVILL and WEST, JJ.

Branson, with him *Máhádev Chimnáji A'pte*, for the defendants:—No suit for possession of a wife will lie. A decree ordering such possession cannot be enforced: *Gatha Ram v. Moolita* (1). She cannot be treated as a chattel, and ordered to be delivered up. The second defendant is not at all liable. He did not object to the first defendant going to her husband; he merely interfered to prevent force being used: *Philp v. Squire* (2); in that, as in the present case, the second defendant acted solely from principles of humanity. See also *Marcumont v. Marchmont* (3).

The plaintiff charged his wife before a Magistrate with having committed adultery with the second defendant. The charge was proved to be utterly false. This conduct amounts to legal cruelty: *Bray v. Bray* (4). Here a false charge of incest was held tantamount to cruelty. *Milner v. Milner* (5). In this case treatment by the husband of his wife as a common prostitute in the streets was

(1) 11 Beng. L. R. 298.

(2) Peake's N. P. Cases, 114. In that case, however, as in the similar case of *Berthon v. Cartwright* (2 Esp. 480), the wife took refuge with the defendant on account of ill-treatment by the plaintiff.

(3) MacQueen on Divorce, 317. (4) 1 Hagg. Eccl. 163. (5) 4 Swab. and Trist. 24.

1876
YAMUNA'BAI
AND
NA'RA'YAN
JAGANNATH
BHIDE
v.
NA'RA'YAN
MORESHVAR
PENDSE.

considered to amount to cruelty. See also *Kelly v. Kelly* (1) and *Stace v. Stace* (2). The plaintiff in his examination states that he will not take food or water from his wife. This is a threat that he will not treat her as his wife. This also is cruelty.

Shámráv Vithal for the plaintiff:—The second defendant is clearly liable. He has throughout the proceedings aided and abetted the first defendant. After notice that the plaintiff wanted his wife, he had no business to keep her in his house. Addison on Torts, pp. 802 and 876. The view of the Court below is quite correct on this point.

On the question of cruelty, and to show that the law on the subject was the same in India as in England, he cited *Milford v. Milford* (3), *Ardaseer Cursetjee v. Perozebayer* (4), *Moonshee Buzloor Ruheem v. Shumsoonissa Begum* (5). This case is quite conclusive to show there has not been such cruelty as to justify the wife's desertion. To show the Hindu custom on the subject he referred to pages 31, 32, 170, and 172 of Steele's Law and Custom of Hindu Castes.

The judgment of the Court was delivered by

MELVILL, J.:—In this case the plaintiff asks that his wife, the first defendant, may be compelled to return to him, and that the second defendant, in whose house she has been living and who has opposed her return, may be ordered to deliver her up.

It has been faintly argued at the bar that a suit for the restitution of conjugal rights will not lie in our Courts, or, at all events, that a decree ordering such restitution cannot be enforced; and, in support of this argument, we have been referred to a judgment of Mr. Justice Markby, reported 14 Beng. L. R., 298. The judgment does not deny, and the decision of the Privy Council in *Moonshee Buzloor Ruheem v. Shumsoonissa Begum* (6) conclusively establishes, that such a suit may be maintained. The question of the mode of enforcing the Court's decree is at present premature, and we only allude to it as affecting the question of the admissibility of the suit. If it were admitted that a Court could

(1) 39 L. J. 9 Mat. Ca. (2) 37 L. J. 51 Mat. Ca.

(3) 1 L. R., 295 (Pr. and Div.) (4) 6 Moore I. A., 348.

(5) 11 Moore I. A., 551. (6) 11 Moore I. A., 551.

not enforce its decree, that would be a strong ground for holding that the Court could not entertain the suit. In the case above referred to, the Privy Council has expressed an opinion (which Mr. Justice Markby does not notice) that disobedience to the order of a Court directing the wife to return to cohabitation would seem to fall within the 200th Section of the Civil Procedure Code, and to be enforceable by imprisonment or attachment of property, or both. The Bengal High Court [6 Calc. W. R. 105 Civ. Rul.] had previously come to the same conclusion; and in *Ardasar Jahānghir Fīāmji v. Avābāi* (1) I have treated the question as settled by authority. We see no reason to entertain any doubt on the subject now. We are unable to agree with Mr. Justice Markby that a decree, which orders a wife to return to her husband's protection, amounts to nothing more than a declaration that the relation of husband and wife exists between the parties. In nine cases out of ten there is no dispute as to the existence of that relation; and a declaratory decree to that effect is not what the plaintiff asks, nor what the Court professes to give him. The policy of entertaining and enforcing such claims may be open to question; but, so long as their jurisdiction is not barred by legislation, our Courts have no discretion in the matter. In the case of Páris the Legislature has, by Act XV. of 1835, made express provision for such suits and for the enforcement of the decree [Section 36]; and the cases to which we have referred are, we think, sufficient authority to support the action of our Courts in similar suits between Hindus and Muhammadan.

1876
YAMUNA'BAI
AND
NARAYAN
JAGANATH
BUIDE
v.
NARAYAN
MORRESHVAR
PLDSR.

The question which we have to decide, as between the plaintiff and his wife, is whether the latter has proved a legal justification for the admitted refusal to return to her husband's house.

The written statement of the first defendant Yamunábái, in answer to the plaint, is as follows:—

“1. I have been observing my husband to be an idiot ever since the day on which my marriage took place. He has not sense enough to manage his own property, or to protect me, or to gain his livelihood by any acquirement, skill, or ingenuity.

(1) 9 Bom. II. C. Rep., 290.

1876
 YAMUNA'BA'I
 AND
 NA'RAYAN
 JAGANATH
 BHIDE
 v
 NA'RAYAN
 MORFESHVAR
 PENDSE.

" 2. My father-in-law died about 10 months ago ; [and my] mother-in-law died about 5 months ago. Now I have no one [left] on the side of [my] father-in-law except [my] idiotic husband. After the death of my father-in-law I was living even with my mother-in-law, who was a very old [woman]. There being [residing] in the dwelling-house of my father-in-law and mother-in-law and husband, Rámchandra Mahádev and many other persons of young age, it came to pass that I could not live in that house with respectability [decency]. As the husband of my aged mother-in-law was dead, there was a difficulty in the way of [her] going out [of her house] owing to the custom of Brahmançaste. On this account, and as my husband was an idiot, they could not restrain Rámchandra Mahádev and others of [his] kinsmen. Therefore my mother-in-law with the consent of Sowbhágyavati (an epithet of respect prefixed to the names of women whose husbands are living), Godávaribái Nátu, the granddaughter of my mother-in-law, sent me, on account of the [aforesaid] difficulty, to reside in the house of the defendant No. 2, Náráyan Jaganáth Bhide, son-in-law to my mother-in-law. My mother-in-law was to come there after with my husband to reside at [the said] Bhide's ; [but in the meantime] she died at Bhade.

" 3. I do not believe that the present suit is instituted against me by my husband of his own sense. He has not sense enough to do this. Rámchandra Mahádev Pendse has got my idiotic husband under his hand (influence), and has put forth his [my husband's] name, and caused this suit to be instituted. Therefore [I pray that] the Court will be so gracious as to make him [Rámchandra Mahádev Pendse] another plaintiff or defendant [in this case], that is to say, enter his name as one of his parties opposed to me.

" 4. As said above, I came from the house of [my] husband to the house of the defendant No. 2 in or about the month of last Bhádrapad [September 1872] ; since that day I have never at all been invited by [my] husband. [My] mother-in-law had directed [me] not to go to the house of the Pendses, unless I was invited by [my said] mother-in-law herself. Accordingly I never went [thither].

" 5. On the day of the [institution of this] suit, my husband and Rámchandra Mahádev Pendse came to [the said] Bhide's

house, and [my] husband remained standing near the *gattar* [outside the house]. As he [my husband] could not say anything, Rámchandra Mahádev came inside and asked me to go to [my] father-in-law's [*i.e.*, my husband's] house. Then I said that my husband was an idiot, that he (Rámchandra) should not allure him with a bait and deceive him, that he should not ruin him and me, but that he should make over [my] husband to me. I said this on that day, and I had sent messages [to the same effect] once or twice before. But Rámchandra did not attend to it. And on the aforesaid day he took away [my] husband. At present I am feeding and maintaining myself with respectability (decency) in the said Bhide's house, by assisting his daughter-in-law at her toilette, and doing other light work, and at times of inconvenience by cooking and winnowing grain, &c., and doing other light work.

"6. So long as my husband is 'in the hands' (*i.e.* 'under the control') of Rámchandra Mahádev and other kinsmen [of my husband], that is to say, those who are entitled to be heirs [to my husband] after his [my husband's] [death], I am not willing to go to my husband at the house of the Pendses, and under [their] control. For [my] husband is an idiot, and if they should impute to me adultery and various other crimes, I shall be defeated of my right of succession to my husband's property and of [my] right of [getting] food [and] clothes [maintenance] [from that property after his death], and the right will be gone to Rámchandra Mahádev and others. I am [therefore] unwilling to go under the control of such persons, without any protection, and from their former conduct I entertain the greatest apprehensions that they will do so.

"7. [I pray that] the Court will [be pleased to] consider whether my aforesaid statements are proper or not, and to enter the name of Rámchandra Mahádev as one of the parties opposed [to me], and to reject my husband's claim and to award all my costs against the said Rámchandra Mahádev."

It has hardly been attempted to maintain that any of the allegations contained in this statement would, if proved, constitute a sufficient justification for the defendant's refusal to live with her husband. The plaintiff, as the Assistant Judge says, is admittedly a man of very low mental capacity, on the border line of idiocy.

1878
YAMUNA'BAI
AND
NA'RA'YAN
JAGANATH
BHIDE
v.
N'ALA'YAN
MOHESHWAR
PENDSE.

1876
 YAMUNA'BA'I
 AND
 NA'RA'YAN
 JAGANATH
 BHIDE
 v.
 NA'RA'YAN
 MORESHIVAR
 PENDSE.

But Yamunábái has not alleged that she entertains any apprehensions to her safety on this account, nor indeed that she is unwilling to live with her husband on this account. On the contrary, on the same day on which the present suit was filed, she filed a counter-suit to obtain possession of her husband, alleging that he was of unsound mind, and that she was the proper person to have charge of him, but that his cousin, Rámchandra, refused to give him up. Her objection was not to living with her husband, but with her husband's relatives. Now it is easy to conceive that the annoyances of married life must be often much aggravated by the necessity which a Hindu wife is under of living in the same house with the whole of her husband's family; and ill-treatment at the hands of her husband's relations, from which he was powerless to protect her, might reasonably be urged as a ground for refusing to live with him. But no such ill-treatment has been alleged in the defendant's written statement. It has, indeed, been suggested to us by the learned counsel for the special appellants that that statement implies much more than it expresses; that the first defendant left her husband's house in consequence of an attempt made upon her virtue by her husband's cousin Krishnáji; and we are asked to order the examination of certain witnesses, whose evidence, it is said, would establish this fact. Undoubtedly no Court would order a wife to return to her husband's house if she were liable to be exposed to an outrage of this description. But it is impossible to pay any attention to a mere verbal allegation made at this late period of the proceedings. If the defendant had so good a defence, she should have made it distinctly, and have raised an issue regarding it. She should, at least, have come forward to give evidence. She was summoned as a witness, and her pleader twice obtained an adjournment in order to produce her. But she remained absent, and her absence has never been accounted for. It is out of the question that the Court should now order an inquiry into the truth of an allegation which does not even appear on any part of the record, and which the person making it does not venture to substantiate upon oath.

There is one circumstance in this case, and one only, which raises any doubt as to the right of the plaintiff to the relief which he seeks. Soon after this suit was instituted, the plaintiff lodged

a complaint before the Magistrate, charging the second defendant with having committed adultery with the first defendant. He swore that he had himself witnessed circumstances leading to the conclusion that adultery had taken place. He was disbelieved, and his complaint was rejected without inquiry. He then brought the matter before the higher Courts, but without success. In the present suit he has again put forward this charge of adultery, and has called his relations to support it. The Assistant Judge has found that the imputation is utterly groundless. We must take it, then, that the plaintiff and his relations, in their endeavour to gratify their hatred against the second defendant, has not hesitated to asperse the character of the plaintiff's wife. In his deposition before the Magistrate the plaintiff used a very opprobrious expression in reference to his wife, and when pressed with his inconsistency in wishing to recover possession of a wife whom he held in such low esteem, he said that, if she returned to him, it would be inconsistent with his religion to receive food and water from her hands, though in other respects he should treat her with the affection due from a husband to a wife. It has been much pressed upon us that the unjust aspersions cast by the plaintiff on his wife amount to cruelty, and that the treatment to which he has himself said that he intends to subject her, would also amount to cruelty, and that on these grounds the defendant should not be compelled to return to his house.

In *Moonshee Buzloor Ruheem v. Shumsoonissa Begum* (1) their Lordships of the Privy Council say:—"It seems to them clear that, if cruelty in a degree rendering it unsafe for the wife to return to her husband's dominion were established, the Court might refuse to send her back. It may be, too, that gross failure by the husband of the performance of the obligations which the marriage contract imposes on him for the benefit of the wife, might, if properly proved, afford good grounds for refusing to him the assistance of the Court" (2). In the present case we are only concerned with the question of cruelty; and on that point their Lordships, in another part of the same judgment, say:—"The Mahomedan law, on a question of what is legal cruelty between man and wife, would probably not differ materially from our own, of which

1876
YAMUNA'DAT
AND
NARAYAN
JAGANNATH
BHIDE
PL.
NARAYAN
MOHNSHWAR
PENDSE.

(1) 11 Moore I. A. 551.

(2) *I. Ib.* 615.

1876
YAMUNA'BAI
AND
NA'RA'YAN
JAGANATH
BHIDE
P.
NA'RA'YAN
MORESHVAR
PENDSE,

one of the most recent expositions is the following:—‘There must be actual violence of such a character as to endanger personal health or safety; or there must be a reasonable apprehension of it.’ ‘The Court,’ as Lord Stowell said in *Evans v. Evans*, ‘has never been driven off this ground’” (1). The recent case, to which the Privy Council refer, was no doubt the case of *Milford v. Milford* (2). A number of earlier cases have been quoted to us as showing that to constitute legal cruelty, it is not necessary that there should be actual violence; and, no doubt, some of those cases do indicate a desire on the part of the English Judges to enlarge the definition of cruelty, so as to embrace certain cases of peculiar hardship. But the authority of the later cases is conclusive as to the present state of the English law. In *Milford v. Milford* the Judge Ordinary took time to consider his judgment, observing:—“The question of cruelty requires a very critical examination. It is just one of those cases in which the Court is bound to take care that it is not induced, by the desire of giving full relief to the wife, to trespass beyond the limits assigned by the law to the definition of legal cruelty.” And afterwards, in delivering judgment, he said:—“The essential features of cruelty are familiar. There must be actual violence of such a character as to endanger personal health or safety, or there must be the reasonable apprehension of it. The Court, as Lord Stowell once said, has never been driven off this ground. Nor do the cases cited in the argument, whatever general expressions may have fallen from the Court, affect to decide that anything short of this will be sufficient to found a decree upon cruelty. The ground of the Court’s interference is the wife’s safety, and the impossibility of her fulfilling the duties of matrimony in a state of dread.” In the still more recent case of *Kelly v. Kelly* (3) the Judges stated the law in similar terms, and granted a judicial separation on the ground that, if force, whether physical or moral, is systematically exerted to compel the submission of a wife to such a degree and during such a length of time as to injure her health, and render a serious malady imminent, although there be no actual physical violence such as would justify a decree, it amounts to legal cruelty. In that case, then, the Judges were careful to keep within the limits laid down in previous cases. The question for us to decide is

(1) Moore L. A. 611.

(2) 1 L. R. (P. and D.) 295.

(3) 39 L. J., 59 Mat. Ca.

whether, in this country, we ought to extend those limits, and to enlarge the definition of legal cruelty so as to allow a wife to justify her desertion of her husband upon grounds which in England would not amount to a justification. After a careful consideration of this question, we have come to the conclusion that we ought not to do so. Native law and custom is, at least, as stringent as English law in regard to the duty of a wife to live with her husband. As the Judicial Committee say of the Mahomedan law, so we would say of the Hindu law, that, on a question of what is legal cruelty between man and wife, it would probably not differ materially from our own. Any difference there might be, would be in the direction of greater strictness, not of greater laxity,—at least in regard to the treatment of the wife by the husband. A Hindu wife cannot, any more than an English wife, claim a divorce on account of merely her husband's inconstancy; but she may demand a separate maintenance if her husband ill-treat her on account of a favourite wife or mistress (1). She may abandon a husband who communicates anything noxious (2). In the case of any undue chastisement, in the exercise of marital rights, our Courts would probably adopt the views expressed by Sir Thomas Strange (3), though in the Presidency towns they might possibly be somewhat hampered by the provisions of 21 Geo. III., C. 70, S. 18, and 37 Geo. III., C. 142, S. 12. But we do not think that we should be justified under Hindu law, any more than under English law, in holding that an unfounded imputation upon a wife's chastity, however gross an outrage, is by itself sufficient to constitute legal cruelty. An American writer (4) refers to an old case in Scotland (*Le Nae v. Moir*, A.D. 1750) where a husband publicly and perseveringly reproached his wife falsely with lascivious behaviour and immoderate lust, and in which the Commissaries of the Court of Session held this a sufficient ground for a judicial separation; but the House of Lords reversed the decision. The observations of this writer on this subject are worth quoting. "The proposition," he says, "seems to be, on the whole, well established in England and in most of our States, that the harm to be apprehended must be bodily harm, in distinction from mental suffering.

1876

YAMUNA^{BA}'I
AND
NA^{RA}'YAN
JAGANATH
BHIDE
".
NA^{RA}'YAN
MOR^{SH}VAR
PENDSE.

(1) Steele 170. (2) 2 Colebrooke 180. (3) 1 Stra. II. L. 49.

(4) 1 Bishop on Mar. and Div. 724.

1876
YAMUNA'BA'I
AND
NA'RA'YAN
JAGANATH
BHIDE
v.
NA'PA'YAN
MORESHVAR
PENDER.

For, while it is admitted that pain of mind may be even more severe than bodily pain, and a husband disposed to evil may create more misery in a sensitive and affectionate wife by a course of conduct addressed only to the mind, than if, in fits of anger, he were to inflict occasional blows upon her person; still it is said that in such a case 'the Court has no scale of sensibilities by which it can gauge the quantum of injury done and felt.' The rule, therefore, seems to have arisen, not from any notion of its inherent justice, but from the difficulty of practically administering the opposite rule, of regarding the mind the same as the body." In this country generally, and particularly in the present case, in which imputations of lascivious behaviour are cast by both sides with equal recklessness, it would certainly be impossible to gauge by any scale of sensibilities the quantum of injury done and felt.

As to the statement of his intentions contained in the plaintiff's deposition before the Magistrate, to which reference has been made, it is sufficient to say that, even if it be regarded as a menace seriously intended, it falls short of a justification of the first defendant's refusal to return to her husband.

It follows that the first defendant has not, in our opinion, proved legal cruelty on the part of her husband or his relations. In a suit between Hindus, we consider that the only safe and practical criterion of cruelty is that contained in the definition which guides the English Courts, namely, that there must be actual violence of such a character as to endanger personal health or safety; or there must be the reasonable apprehension of it. In a suit between Muhammadans the Privy Council has expressed its opinion that the same definition is applicable; and in the Pársi Chief Matrimonial Court of Bombay, over which I now preside, a similar definition was adopted at an early period of the Court's existence (*Fardunji v. Kursetji Dinbái*, 23rd November 1869).

The next question is whether the plaintiff, having established his right to compel his wife to return to his protection, is entitled also to a decree against the second defendant, Náráyan Bhide. The law on this subject is correctly stated by the Assistant Judge. Every person who receives a married woman into his house, and suffers her to continue there after he has received notice from the husband not to harbour her, is liable to an action for damages, unless the hus-

band has, by his cruelty or misconduct, forfeited his marital rights, or has turned his wife out of doors, or has, by some insult or ill-treatment, compelled her to leave him (1). The present plaintiff asks, not for damages, but for an injunction; and he is entitled to an injunction if he has proved his case, and if the conduct of the second defendant still continues to show a necessity for it. The Assistant Judge has found that the second defendant did harbour the first defendant after notice from her husband; and, looking to the conduct of the second defendant throughout the proceedings in the suit, we cannot entertain any doubt that he has been, and is, actively, aiding and abetting the first defendant in her opposition to her husband's wishes.

1876
YAMUNA'BAI
AND
NARAYAN
JAGNATH
BHIDE
v.
NARAYAN
MORSEDIAR
PLINDSE.

Our decree must be that the plaintiff is entitled to his conjugal rights, and that the first defendant, Yamunábái, be ordered to return to his protection, and that the second defendant, Nárúyan Bhide, do abstain from harbouring the first defendant, and from offering any obstruction to the return of the first defendant to her husband's protection.

Having regard to the conduct of the parties, and to all the circumstances of the case, we think that each party should bear his and her costs throughout.

We amend the decree of the Court below accordingly.

[APPELLATE CRIMINAL JURISDICTION.]

Criminal Review No. 7 of 1876.

In re KESHAV LAKSHMAN.

1876
March 23.

*Award of Compensation—The Code of Criminal Procedure (Act X of 1872),
Section 209—Complainant.*

A *kárkun* on the establishment of a Civil Court, entrusted with the execution of a writ, reported to the Court that a particular person obstructed him in attaching property as commanded by the writ; and a report was thereupon made by the Court to a Magistrate, with a view to proceedings being taken against the obstructor. The Magistrate acquitted the accused and ordered the *kárkun* to pay the accused compensation under Section 209 of the Criminal Procedure Code.

(1) Addison on Torts 802.

1876
In re KESHAV
 LAKSHMAN.

Held, that such last mentioned order was wrong, the *kárkun* not being a complainant within the meaning of Section 209 of the Code of Criminal Procedure. In such a case as the above the Subordinate Judge should be regarded as the complainant, and he, having acted judicially, was not liable to the penalty provided in Section 209 of the Criminal Procedure Code.

THIS was an application to the High Court for review of an order passed by F. L. Charles, Magistrate, 1st Class, in the Tanna District, under Section 209 of the Criminal Procedure Code.

The facts of the case were shortly these:—The petitioner, Keshav Lakshman, was a *kárkun* on the establishment of the Subordinate Judge at Pimpalgaon in the Tanna District, and was, as such, entrusted with the execution of a writ of attachment of certain property in execution of a decree against one Abá valad Krishna. The petitioner made a report to the Subordinate Judge that the said Abá offered obstruction to the attachment levied by the petitioner in the said execution; and the Subordinate Judge, on the strength of this report, forwarded the matter to the 1st Class Magistrate in order that it might be dealt with as a criminal case. The Magistrate, after taking the evidence of the *kárkun* and other witnesses, found that no obstruction to the attachment had been offered by the said Abá, accordingly acquitted him, and directed the *kárkun* to pay Rs. 5 to the said Abá as compensation under Section 209 of the Criminal Procedure Code.

The matter was brought to the notice of the Sessions Judge of Tanna, who refused to interfere.

The petition was heard by MELVILL and WEST, JJ.

Pándurang Balibhadrá for the petitioner:—The petitioner was a Court *kárkun*, and he acted under the orders of the Subordinate Judge. He was in no sense a complainant. He could not have disobeyed the order of the Subordinate Judge to proceed against the obstructor Abá. The order of compensation is, therefore, illegal and should be reversed.

PER CURIAM:—The Court thinks that the Subordinate Judge, and not the *kárkun*, Keshav, must be regarded as the complainant in the proceedings before the Magistrate. The Subordinate Judge acted judicially, and, on that ground, would not be subject to the penalty provided in Section 209 of the Criminal Procedure Code.

The *kárlun*, if he made a false report to the Subordinate Judge, or gave false evidence before the Magistrate, is punishable otherwise; but, not being the complainant, he also is not liable to have the payment of compensation awarded against him under Section 209 of the Criminal Procedure Code.

The Court reverses the order of the Magistrate, which directed that Keshav Lakshman should pay Rs. 5 to Abá valad Krishná as compensation.

Order accordingly.

[ORIGINAL CIVIL JURISDICTION.]

Suit No. 829 of 1873.

Appeal No. 288.

MURARJI GOKULDÁS AND OTHERS (ORIGINAL DEFENDANTS, APPELLANTS) 1876
In re KESHAV
LAKSHMAN.
March 25.
v. PÁRVATIBAI (ORIGINAL PLAINTIFF, RESPONDENT).

Hindu Law—Inheritance—Blindness—Disqualification to inherit.

According to the Hindu law, as prevailing in the Bombay Presidency,* blindness, to cause exclusion from inheritance, must be congenital.

Therefore where the widow of a childless intestate, though proved to have been totally blind for some years before the death of her husband, was admitted not to have been born blind.

Held that such blindness did not prevent her from inheriting the property of her husband on his decease.

GOKULDA'S VITHALDA'S died intestate and without issue in the year 1873, leaving him surviving his widow Sakerbái, who, though not born blind, had been totally blind for some years before his death, and his sister Párvatibái, the plaintiff. Sakerbái died some two or three months after her husband, having, about a week previously, made a will, whereby she bequeathed certain Government promissory notes and money, which had been the property of her husband, to the defendants, as trustees and executors, to be applied in the trusts of her will. After the death of Sakerbái, Párvatibái, claiming as the heir of Gokuldás Vithaldás, sued the defendants for possession of the Government promissory notes

* * *Note.*—In *Mohesh Chunder Roy v. Chunder Mohun Roy* (14 Beng. L. R. 273) it was held that the Hindu Law as prevailing in the Bengal Presidency is similar.

1876
MURA'JI
GOKUL DÁS
v.
PÁRVATIBÁI.

and money. She rested her claim principally on two grounds: 1st, that Sakerbái, being blind at the time of the death of her husband, was, under the Hindu law, incapable of inheriting from him; and, 2nd, that the alleged will of Sakerbái was a forgery. The suit was originally tried before Bayley, J., and occupied several days in the hearing, a considerable amount of evidence being given on both sides. Finally, the learned Judge, being of opinion that the will was a forgery, directed it to be impounded, and passed a decree in favour of the plaintiff, without recording any decision on the point of law as to whether Sakerbái's blindness operated as a bar to her inheriting the property of the deceased. From this decree the defendants appealed.

The appeal was argued before WESTROPP, C. J., and SARGENT, J., on 17th and 18th December 1875 and 14th and 15th January 1876.

Scoble (Advocate General) and *Badrudin Tyabji*, for the appellants, on the point of law contended that blindness to bar inheritance must be congenital.

Latham and *Lang*, for the respondent, argued that blindness existing at the time that the inheritance should vest, was a bar, whether congenital or not.

The authorities cited appear in the judgment of the Appellate Court. The question of the genuineness of the will of Sakerbái was, of course, also fully argued; but, being one that depended entirely on the facts and evidence, need not be considered here.

Cur. adv. vult.

On March 25th, 1876, the following judgment on the point of law was delivered by

WESTROPP, C.J.:—The subject matter of this suit consists of Government promissory notes and money in the hands of the defendants which in the lifetime of Gokuldás Vithaldás belonged to him. He died at Porebunder, without issue, in June 1873. Párvati, the plaintiff, as his alleged heir, sues to recover the property in question. The defendants rely upon a will, alleged to have been made at Porebunder by Sakerbái, the widow of Gokuldás Vithaldás, on the 24th of August 1873. Sakerbái died

on the 2nd of September 1873. She appears to have become blind some time previously to the death of her husband. One of the points relied upon on behalf of the plaintiff Párvati, before us at the hearing of the appeal, was that Sakerbái's blindness disqualified her for inheriting from her husband, and, therefore, that her will, even if genuine, could not affect the property in dispute. Mr. Justice Bayley, having decided in favour of the plaintiff Párvati upon another ground, did not give any opinion on this question as to the competency of Sakerbái to inherit.

1876
MUR V. JI
GOKULDA'S
P.
PÁRVATIBÁI

It is admitted that Sakerbái's blindness was not congenital. It supervened in comparatively recent years as she advanced in life, but in the lifetime of her husband, and, upon the evidence, we think that she must be regarded as totally blind at the time of his death. The question, therefore, for solution is, whether total blindness, not congenital, prevents the person so afflicted from inheriting.

Manu, the chief of the Rishis, and of whose high authority at this side of India there cannot be any doubt (see the remarks of Sausse, C. J., in *Pránjivandás Tulsidás v. Devkuvarbái*) (1) in Chap. IX, pl. 201, of Sir W. Jones' Translation by Haughton, says :—"Eunuchs (2) and outcasts, persons born blind or deaf, madmen, idiots, the dumb, and such as have lost the use of a limb, are excluded from a share of the heritage." This text is also to be found in Jagannátha's Digest, Vol. III, Bk. V, Ch. V, pl. cccxxix. Commenting upon it, Jagannátha commences with a reference to the doctrine of the Retnakara, which expounds the text by remarking that, "by the mention of birth the legislator (Manu) suggests the incurableness, not the origin, of the blindness." Jagannátha says of that exposition :—"The meaning is, as persons afflicted by a hopeless malady must be supplied with food and raiment, so must he who is afflicted by incurable blindness and so forth." We should here observe that the Retnakara, though of authority

(1) 1 Bom. II. C. Rep. 130 ; see p. 131.

(2) Rendered by Colebrooke in his translation of the Mitakshara, Ch. II, S. X, pl. 3, and by Borrodaile in his translation of the Mayukha, Ch. IV, S. XI, pl. 3, "impotent persons." So, too, by Prosonno Coomar Tagore in his translation of the Viváda Chintámani, p. 242.

1876
MURARI
GOKULDA'S
v.
PARVATHA'I.

in Maithila, is not so in this Presidency. Jagannátha does not accept its non-natural exposition of the text of Manu as correct. Referring to that exposition he says:—"That is not the opinion of Calluca Bhatta, for he expounds the text thus:—'Eunuchs, fallen sinners, persons born blind or devoid of the sense of hearing, madmen, those who support not the performance of duty, and such as are deprived of speech.' Calluca Bhatta's commentary is much valued in this Presidency. Jagannátha adds that Jimuta Vahana says the word 'born' is connected both with 'blind' and with 'deaf'" (see to that effect the *Dāya Bhāga*, Ch. V, pl. 7, 9). Jagannátha continues:—"In expounding the text of Devala above cited (cccxxi)," (hereinafter mentioned), "he (Jimuta Vahana) says 'blind' signifies born blind; for this coincides with the expression 'born blind or deaf' in the text of Manu. In practice the succession of one who becomes deaf in the course of his life occurs, even though the deafness be incurable: the same is also proper in a case of blindness. Consequently the term must be understood as signifying one born blind, or born deaf;" and Jagannátha subsequently observes:—"such as have lost the use of limb' not such as have lost any organ generally, (for that would include a vain repetition of the terms blind and deaf); but such as have lost the use of some one limb; for example, wanting the use of a hand or of a foot. The repetition of 'blind' and the rest may be supposed by the same rule by which two names of kine are at once employed in a general and particular sense. 'Wanting the use of a foot' in effect signifies lame." Srikrishna Tarkalankara in the *Dāya Krama Sangraha*, Ch. III, after quoting the text of Manu, says:—" 'Born blind and deaf.' That is by nature, and not those who have become so from some adventitious cause: the meaning, therefore, is those who are blind and deaf from the period of their birth."

In the same (3rd) volume of the Digest, Bk. V, Ch. V, pl. cccxxxi, Jagannátha, as translated by Mr. Colebrooke, gives the following text of Yājñavalkya, another of the Rishis of great authority:—"An outcast and his son, an eunuch, one lame, a madman, an idiot, one born blind, and he who is afflicted by an incurable disease, must be maintained without any allotment of shares." Vāchaspati Misra, in the *Vivāda Chintāmani*, as

translated by Prosonno Coomar Tagore, gives the same text thus :—"an outcast and his son, an impotent person, one lame, a madman, an idiot, one born blind, he who is afflicted with an incurable disease, and the like, must be maintained without any allotment of shares." In both of these readings it will be observed that the word "born" precedes "blind," and neither of the translators uses italics to indicate that the word "born" is his interpolation. It is, therefore, reasonable to assume that in the Sanskrit MSS., from which Jagannátha and Váchaspati Misra thus quoted, the text contained the word "janma" or some similar word, signifying "born" or "from the birth." We unfortunately have not, at present, access to Sanskrit copies of the Digest or Viváda Chintámáni to which we can refer in order to ascertain how the fact is, viz., whether or not the translators only are responsible for the word "born." Even, however, if, as is quite possible, the use of that word is imputable to them only, it is of great importance that they, and more especially Mr. Colebrooke, should have conceived the true meaning of the word "blind" to be "born blind." Colebrooke's invariable practice, so far as we know, was to denote, by italics, or brackets, words which were not in the original text and which were introduced by himself. He has, in translating the text of Devala, which we shall presently quote *in extenso*, introduced the word "born" in italics before the word "blind." Possibly the word "born," used by him in rendering the text of Yájnyavalkya, may have been intended to be in italics, and its appearance in Roman type may be the error of printer—a supposition, which it might be argued, is to some extent supported by Jagannátha's commentary on the same text, where he says:—" 'Blind' signifies born blind. So the Dipacalica." He then, however, adds:—"It should be here remarked that the term 'lame' being contiguous to the word 'blind' must signify born lame. In like manner 'persons deprived of the use of their hands' must signify such as are destitute of the use of both hands from the day of their birth." It is difficult to conceive how the mere contiguity of the word 'lame' to the word 'blind' could indicate that 'lame' meant born lame, unless 'blind' was, in the MS. of the original text used by Jagannátha, conjoined with 'born' or 'from the birth.' That it

1876
MURARI
GOKULDA'S
PRAVAHA

1876
MURKUPJI
GOLWALA'S
v.
PARVATIBAI.

was so, is supported by the text as given in the translation of the Vivāda Chintāmani, which we have quoted. The manuscript of Yājñyavalkya, used by the authors of the Mitākshara, Mayukha, Dāya Krama Sangraha, and Smṛiti Chandrika, would seem to have contained the word 'blind' only; for the translators do not, in rendering the same text as quoted in those works, introduce the word 'born'. Roer and Montrieux also, in their translation of Yājñyavalkya, p. 46, omit the word 'born'.

Another Rishi of high authority, Nārada, in speaking of persons disqualified for inheritance, says: "One afflicted with an obstinate or an agonizing disease, and one insane, blind or lame from his birth, must be maintained by the family; but their sons may take the shares of their parents." We take this reading of the text from Jagannātha's Digest as translated by Colebrooke, Vol. 3, Bk. V, Chap. V, pl. cccxx, cl. 2. Jagannātha whilst giving to this reading of Nārada's text the preference, mentions, in his commentary upon it, that there is a different reading of the same text. He says:—"Insane from his birth," it is hereby intimated that one who subsequently becomes insane from the pernicious power of mineral drugs, or the like, is not excluded, any more than one who subsequently becomes blind or lame. In the Vivāda Chintāmani the text is read 'idiot (jada), insane, blind or lame' instead of 'insane, blind or lame from his birth (janma)'; 'idiot' is there explained 'one who is incapable of discrimination.' In Prosono Coomar Tagore's translation of the Vivāda Chintāmani (pp. 244, 245) the author, Vāchaspati Misra, is represented as quoting Nārada thus:—"Those of the family who are afflicted with long and painful disease, an idiot, one who is insane, blind or lame, should be maintained, but their sons are partakers of the inheritance. Vāchaspati Misra's commentary upon that text is:—"Long disease means consumption and the like." But Srikrishna, in the Dāya Krama Sangraha, Ch. III, pl. ii, speaking of the same text, says:—"Long"—that is, from the period of birth." In the Sanskrit version of Nārada given by West and Bühler, Vol. I, p. 347, texts 21, 22, and in their translation, *Ibid.* p. 354, pl. 21, 22, the blind are not mentioned amongst the persons excluded from inheritance, nor is the phrase "born" or "from the birth" associated with any of those

persons, nor does the term “nirindraya” occur in that version. Those remarks are true also with regard to the version of the same texts of Nārada as given in Mr. Burnell’s translation of the *Dāya Vibhāga* of the *Madhaviya*, p. 39, pl. 49, and in the translation of the *Smṛiti Chandrikā* of *Kṛṣṇasawmy Iyer*, p. 61, pl. 5.

1876
MURRAY
GOKULDA'S
PAIN ALBERT.

Devala’s text on this subject, as translated by Colebrooke in 3 Dig., Bk. V, Ch. V, pl. cccxxi, is:—“On the death of a father, *or other owner of property*, neither an impotent man, nor a person afflicted with elephantiasis, nor a madman, nor an idiot, nor one *born* blind, nor one degraded for sin, nor the issue of a degraded man, nor a hypocrite or impostor, shall take any share of his heritage.” The word “born” is in italics, and, therefore, is the interpolation of the translator. That translator, being Mr. Colebrooke, it is important to know that a scholar, so eminently competent, understood Devala, in referring to blindness as a disqualification, to mean congenital blindness only.

In the same volume, book, and chapter of the Digest is the following text of Baudhāyana (cccxxviii):—“persons incapable of transacting business, blind men, idiots, those who are immersed in vice, or afflicted by incurable diseases, and *even* those who neglect their duties, (but not the degraded, nor their issue,) let the heirs supply with food and apparel.” Of this text Jagannātha says (*inter alia*) “‘blind men’, persons born blind.”

Neither Gautama nor Vasiṣṭha mentions the blind amongst the persons disqualified for inheritance. See 1 West and Bühler, p. 326, pl. 41 and p. 334, pl. 27, 28; 3 Dig., Bk. V, Ch. V, pl. cccxxxv, cccxxxviii.

Sir Thomas Strange⁽¹⁾ discusses disabilities to inherit, and after saying that “exclusion from inheritance, with the Hindu, rests, in general, upon the same principle with succession to it; *i.e.*, it is connected with the obsequies of the deceased; from their incapacity to perform which the excluded are incompetent as heirs,” proceeds first to mention “idiots, madmen, the deaf, the dumb, the blind, the lame, and the impotent.” Speaking of these he says (p. 153):—“And it is only where these infirmities are coeval with birth that the disability attaches: though Jagannātha seems

(1) 1 Str. H. L. Ch 7, pp. 152 *et seq.*, Edn. of 1830.

1876
MURAJI
GOKULDA'S
P. n.
PA'LVALIB'V.

to make the case of the madman an exception in this particular ; and of the impotent (who is also excluded,) it is said, by a sensible author, to be indifferent whether he is naturally so or by castration." The passage in Jagannátha's Digest, to which Sir T. Strange refers as showing that Jagannátha was of opinion that insanity is an exception to the general rule that the deficiency must be congenital, is at the commencement of his commentary on a text of Vishnu (cccxxvi) in Vol. III, Bk. V, Ch. V, page 314, where in speaking of certain diseases he says that they may proceed "from the pernicious effects of drugs; but if they be ascertained to be the marks of an atrocious crime, or of sin in the highest degree, disability is admitted by the terms of the text of Nárada (cccxx 2) (1). It is the same of one who becomes insane in the course of his life." Unless this remark as to insanity be strictly limited to such an aberration of intellect as is clearly proved by the assertors to be the result of an atrocious crime, or of sin in the highest degree, a proposition at all times extremely difficult, if not impossible, to establish, Jagannátha must be regarded as flatly contradicting himself; for, continuing the same commentary on the text of Vishnu (cccxxvi, Vol. III, p 315), he, referring to the text of Devala, already mentioned, says:—"A madman' in the text of Devala (cccxxi) signifies one insane from his birth, for the import is the same with that of the text of Nárada (cccxx 2). Raghunandana explains 'idiot' one who cannot support the performance of duties: others explain the term, void of understanding. 'Blind' signifies born blind; for it coincides with the text of Nárada." With this latter conclusion, and not at all with the former, the text of Nárada (cccxx, cl. 2), as already quoted from the Digest, and Jagannátha's own remarks upon the texts of Manu, Yájnyavalkya, Baudháyana, and Nárada, which remarks we have already given, appear to be consistent. We should here mention that in *Baboo Rodhnararn Sing v. Baboo Omrao Singh* (2) it seems to have been admitted on both sides that lunacy, supervening before the descent of the property, prevented inheritance. Sir James Colville, in giving the judgment of the Privy Council, said (3) that the point was not argued either before their Lordships or

(1) See also 3 Jag. Dig., Bk. v, Ch. v, pl. cccxxv.

(2) 13 Moore Ind. Ap. 519.

(3) *Id. Ib.* 523.

in the Court below, so the Privy Council gave no opinion upon it. The sensible author, to whom Sir T. Strange refers for the opinion as to the disqualifying effect of supervening impotence, is Bālabhāṭṭa, whose sex and whose estimation here are not such as to confer upon the opinion much weight (1). That view seems, however, to have been also expressed by the author of the *Prakāśa*, but is combated by Jagannātha, who says it "is questionable: for as one who becomes blind in the course of his life ought to share the heritage, so ought one who becomes impotent." We do not gather from the remarks of Sir T. Strange that he was of opinion that the exceptions of lunacy and impotence suggested by Jagannātha and Bālabhāṭṭa ought to be recognised, although he deemed it right to mention what these writers said on the subject. Howsoever that may be, neither he nor they suggest that blindness, deafness, and lameness are exceptions to the general rule that infirmities to disqualify for inheritance must be congenital.

1876
MURARI
GOKULDA'S
P.
PALVATIBA/L.

In the *Mitākshara*, Ch. II, S. X, pl. 3, Vijñānesvara quotes, without a word of disapprobation or dissent, the text of Manu already mentioned. The word 'nirindraya' in that text, which Sir William Jones has rendered "such as have lost the use of a limb," Mr. Colebrooke has in his translation of the *Mitākshara* rendered thus "those who have lost a sense [or a limb]." The learned counsel for the plaintiff have relied on the next passage, plac. 4, which is: "Those who have lost a sense [or a limb]. Any person who is deprived of an organ [of sense or action] by disease or other cause, is said to have lost that sense or limb" [nirindraya], and contend that it would include blindness which supervened as well as congenital blindness. No doubt the term 'nirindraya' standing alone may indicate the loss of a sense, organ, limb, or member. We must depend upon the context to discover which of these meanings the Rishi intended it to bear. Seeing that Manu had already in the same text made express provision for the impotent, the blind, the deaf, the dumb, the insane and the idiotic, we are strongly inclined to think that by 'nirindraya' he intended to provide for those who were deficient

(1) See 1 West and Bühler, *Introd.*, pp. v-vi.; 7 Bom. H. C. Rep. 168. and *Id. Ib.* Appx. pp. vi-vii.

1876
MURA'RJI
GOKULDA'S
P.
PA'NVATIBA'L.

in a limb or member, and that Sir William Jones correctly interpreted his meaning. And we are strongly fortified in that conclusion by finding that it is that also of Váchaspati Misra in his Viváda Chintámani. Commenting on the text of Manu, he says:—"Those who have lost the use of a limb signifies those who have been deprived of a hand, a leg, or any other member of the body. Such persons are not competent to perform ceremonies relating to the Vedas and Smriti. They are consequently not entitled to inherit paternal property" (1)

But, even assuming that Manu meant by 'nirindraya' to indicate deficiency in a sense, organ, limb, or member, we think that, in including deficiency in a sense or organ, he must thereby have meant deficiency in a sense or organ not already provided for, and that we should give a forced and unnatural construction to his language if we were to hold that, after expressly providing that congenital blindness or deafness should disqualify, he meant by 'nirindraya' that blindness or deafness from any cause should have the same effect. The rule *expressio unius, exclusio alterius*, might be properly applied, and would thus leave the phrase 'nirindraya' in the text of Manu and the 4th placitum of Sec. X, Chap. II of the Mitákshara to operate, not only where there is a deficiency of limb or member, but also a deficiency of any sense or organ not expressly provided for by Manu. We are not, however, to be understood as deciding that a deficiency in any sense or organ is in those passages implied in the word 'nirindraya' as employed by Manu in Ch. IX, pl. 201, or anything more than that he is not by that term to be understood as referring to deficiency in any sense or organ for which deficiency he had already specially provided.

Nilakantha, in the Mayukha, Chap. IV, S. XI, quotes amongst other texts, that of Manu, without contradicting or qualifying it, but with this remark: that, as to the words "have lost a sense (nirindraya)," they mean "deprived of the nose or the like." The translator, Mr. Borrodaile (possibly following the Smriti Chandriká, Ch. V, pl. 61) after the word "nose," adds in a parenthesis "or smell," but that is merely conjectural. Assuming, however, that he be right, it would not interfere with our view

(1) Viváda Chintámani translated by Prosonno Coomar Tagore, p. 243.

that blindness, deafness, or any other deficiency specially provided for by Manu in the same text does not fall within the term 'nirindraya' as used by him. But it is hardly probable that, if supervening deficiency in the more valuable senses of sight or hearing, or in the organ of speech, or in the reasoning faculty, were not permitted by Manu to work disherison, he regarded a deficiency in the minor senses of taste, touch, and smell as sufficient to produce that effect.

1876
MUR'AJI
GOKUL'DAS
".
PA'RVATIBAI.

Váchaspati Misra, in the Viváda Chintámani, quotes, as we have mentioned, the same text of Manu, and without in any wise qualifying, contradicting, or objecting to the word "born."

The three books of chief authority in Western India are Manu, the Mitákshara, and Mayukha. Of these Manu is express on the point that blindness, to disqualify for inheritance, must be congenital. He is quoted and not contradicted by the Mitákshara, Mayukha, and Mahadaviya (1), and is expressly supported by Nárada and also by Yajnyavalkya, if the reading of his text be correctly given by Jagannátha and Mr. Colebrooke. Manu is also supported by Jimuta Vahana and Jagannátha, the authority of whom, respectively, stands higher in Bengal than here. Sir Thomas Strange and Mr. Colebrooke we understand as holding that disqualifying blindness must be congenital.

We now proceed to advert to the decisions.

There are two cases in Borrodaile's Reports on the effect of blindness as a cause of disherison. In neither does it appear whether or not the blindness was congenital. In the case of *Dace v. Poorshotum Gopal* (2), a widow, who was blind, was held disqualified, but it is not stated whether she was blind from her birth. In the case of *Ruvee Bhudr Sheo Bhudr v. Roopshunker Shunkerjee* (3) the appellant was stated to be both blind and deaf, but it is not said whether he had been so from his birth, and the case seems to have been decided against him upon different grounds.

The authorities cited by the Shástri at page 284 of 1 West and Bühler do not support his answer there given to question No. 1.

(1) Burnell's translation of Dáya Vibhága, p. 39, pl. 49.

(2) 1 Bor. 453, Edn. of 1862. (3) 2 *Id.* 713. See p. 727, Edn. of 1862.

1876
MURA'RI
GOKULDA'S
v.
PA'RYATIBA'L.

Those authorities are the *Mitákshara* and *Mayukha*, both of which, as we have seen, quote, without disapprobation, Manu's text, requiring that blindness to disinherit must be congenital. Question 2, at page 285, does not state whether the blind man there mentioned was blind from his birth. The *Shástri* denied that he could be dispossessed. We have consulted our brother West with reference to the remark made by him and Dr. Bühler upon that question and the *Shástri*'s answer to it, in which remark they say that, "if the man was blind at the time the inheritance would have devolved upon him, that circumstance would act as a disqualification."

Our brother West says that, taking the literal reading of the *Mitákshara* as their guide, he and his learned colleague felt bound to give the sense of 'andha' in *Yágyavalkya*'s text as 'notren-driya vikalam'; i. e., deficient in the organ or sense of sight as in Manu, Ch. VIII., pl. 93, where the same word occurs. But he observes that 'andha' in itself may as well mean congenitally blind as deprived of sight by disease or accident, and that, if a harmony of the *Smritis* is to be attained by adopting the fuller expression of Manu as quoted by *Vijnyánesvara* himself, 'born blind' is the preferable translation for 'andha' in *Yágyavalkya*'s text. He adds that, in the passage of *Nárada* on this subject, given at 1 West and Bühler, p. 347, and translated at p. 354, the insanity which excludes is, (as already mentioned by us,) according to some MSS, congenital; according to others, it is not specified to be so. The *Vyavahára Mayukha* in Ch. IV, S. XI, pl. 3, he observes, gives the less liberal reading of the same text in *Nárada*, but the other (that given by *Jagannátha*) stands probably on as good authority. He continues: This text (according to the reading in 1 West and Bühler, 347, 354) does not exclude the blind at all, if taken by itself and, even to the other disqualifications, the various readings which occur in it, as in the other *Smritis* touching on this subject, make it necessary to rely on it as excluding the condition 'from birth.' He says:—That condition occurs with reference to blindness in the text of Manu as quoted in the *Mitákshara* and in the *Mayukha*, and being accepted by *Vijnyánesvara* without qualification may properly be used to explain the sense in which he used the words 'deficient in the

sense of sight.' The commentator on Yājñavalkya was, according to the accepted notion of his office, constrained to interpret the language of every other Rishi in subordination to his own master; but Yājñavalkya himself, as quoted in the Mayukha, Ch. I, S. I, pl. 12, furnishes the rule by which a Court of justice should be governed:—"If two texts differ, reason must in practice prevail."

1876
MURARAJI
GOKULDA'S
" "
PARVATIBAI.

In connexion with the foregoing observations with which our brother West has greatly assisted us, and with the attainment of harmony amongst the Smritis which he suggests, we may, perhaps, refer with advantage to the text of Vrihaspati (3 Dig., pl. cccxxxiii, p. 323):—"Manu holds the first rank among legislators, because he has expressed in his code the whole sense of the Veda; no code is approved which contradicts the sense of *any law promulgated by Manu.*" We are not to be understood as maintaining that, on questions of Hindu Law, the latter portion of this text is universally true; but upon a question as to which the Smritis vary so much as that of disqualification for inheritance, we think that the pre-eminence assigned by Vrihaspati to Manu should not be forgotten.

To question 6, at page 288 of 1 West and Bühler, viz., can a dumb or a madman claim the property of his ancestors, or does his claim extend to a maintenance only?—the Shāstri in reply said:—"If a person is mad or dumb from the time of his birth he cannot claim the property of his ancestors, though he may claim a maintenance from it." The Shāstri appears to have been clearly of opinion that the insanity or dumbness which disqualifies must be congenital.

The Smriti Chandrikā, Chap. V., pl. 9, as translated by Krishna-sawmy Iyer, in its exposition of the text of Vishnu, says:—"Hence it must be understood that such as appear *at the time of division* to have been afflicted with impotence, &c., are excluded from their shares, and that the exclusion is not confined to those only that are *naturally* (that is by birth) impotent or the like." The Smriti Chandrikā, however, is not a book of authority in this Presidency; and, even in Madras, where it is much regarded, we find that the High Court of that Presidency has, in *Tirumamagal*

1876
MURARI
GOKULDA'S
P.
PARVATIBAI.

v. *Ramaswami*(1), held that idiocy to disqualify must be congenital. And, as we have pointed out, the Mahadaviya, which is of high authority in Madras, quotes the text of Manu, Ch. IX., pl. 201, without any mark of dissent or disapprobation.

In *Vallabai v. Bai Hariganga* (2) it has been ruled that dumbness, to disqualify for inheritance, must be congenital, and accordingly the Court directed an issue as to whether the widow there claiming to inherit, had been dumb from her birth.

Upon the best consideration that we have been able to give to this question we are of opinion that there is a considerable preponderance of authority in favour of the conclusion that blindness, to cause exclusion from inheritance, must be congenital.

We, therefore, hold that Sakerbai's blindness did not prevent her from inheriting the property of her husband Gokaldas Vithaldas on his decease upon the 24th August 1873.

The other questions in this case will now be disposed of by my brother Sargent on behalf of us both.

SARGENT, J., then delivered the judgment of the Appellate Court on the questions of fact; and the will of Sakerbai having been found to be a genuine document, and its execution not to have been procured by fraud or undue influence, the decree of the Court below was reversed.

[APPELLATE CIVIL JURISDICTION.]

Special Appeal No. 305 of 1875.

February 2. VALAJI ISAJI AND OTHERS (PLAINTIFFS AND APPELLANTS) v. THOMAS
(DEFENDANT AND RESPONDENT).

Registration Act VIII. of 1871, Section 17, Clauses 2 and 3; Section 18, Clause 7—Acknowledgment of receipt of consideration.

J. T. passed a writing to V., under date the 28th April 1874, stipulating that the deed of sale of J. T.'s bungalow to V., for 4,300, which was to have been made that day, owing to certain circumstances therein mentioned, should be made and delivered by J. T. to V. 20 days thereafter. The writing further acknowledged the receipt, by J. T. from V., of Rs. 100 as earnest money for the purchase

(1) 1 Mad. H. C. Rep. 214. (2) 4 Bom. H. C. Rep. 135 A. C. J.

of the bungalow, and concluded with certain penalties in the event of a default by either party. In a suit in the nature of a suit for specific performance, brought by V. to compel J. T. to execute the deed of sale to V., and to register the same as promised in the writing of the 28th April 1874, 1876
VALAJI ISAJI
v.
THOMAS.

Held that the writing required registration under Act VIII of 1871, Section 17, Clauses 2 and 3, as it distinctly acknowledged the receipt of Rs. 100 as part of the consideration for sale of the house to the plaintiff for the sum of Rs. 4,300, and operated to create an interest in the house of the value of Rs. 100 and upwards.

Mahad v. Dari (1) approved and followed.

Jusab Haji Jafar v. Haji Gul Mahamad (2), *Hargorandas v. Balkrishna* (3), and *Kedarnath Dutt v. Shamlal Khethy* (4) distinguished.

THIS was special appeal from the decision of W. H. Crowe, Assistant Judge at Puna, in appeal No. 55 of 1875, reversing the decree of the Subordinate Judge at Puna in Original Suit No. 742 of 1874.

The facts of the case are briefly these:—Valaji and his two brothers brought this suit against Julia Thomas, and prayed for a decree that, according to the terms of a writing (No. 21) passed by the said Julia Thomas to the plaintiffs on the 28th April 1874, she should be compelled to execute, in favour of the plaintiffs, a deed of sale of a certain bungalow described in the writing, and to register the same. The instrument (No. 21), on which the suit was brought, is fully set out in the judgment of the High Court. The defendant, among other objections, pleaded that the instrument required registration under Act VIII. of 1871, and that as it was not admissible in evidence under Section 49 of the Act for want of registration, the suit was not maintainable. The Subordinate Judge passed a decree in the plaintiffs' favour. The assistant Judge, however, reversed that decree in appeal, on the ground that the document had not been registered as required by Section 17, Clauses 2 and 3, of the Registration Act 1871. The following are his reasons:—

“Exhibit No. 21, the instrument on which the plaintiff has sued, is an agreement passed by the defendant to execute a deed of sale to the plaintiff in respect of a certain house for the sum of Rs. 4,300, and acknowledging the receipt of Rs. 100 as

(1) S. A. No. 430 of 1874. See *infra* p. 196 and note *ibidem*.

(2) 12 Bom. H. C. Rep. 175.

(3) Mentioned in the course of the judgment in *Jivundas v. Framji*, 7 Bom. H. C. Rep. 45 O. C. J.; see p. 67.

(4) 11 Beng. L. R. 405.

1876
 ALA'JI ISA'JI
 v.
 THOMAS. earnest money. Act VIII of 1871, Section 17, Clauses 2 and 3, requires certain documents creating, assigning, or limiting an interest in immoveable property, or acknowledging the payment of any consideration of the value of Rs. 100 and upwards, to be registered, and Section 49 of the Act lays down that no document required by Section 17 to be registered, shall be receivable in evidence, unless duly registered. The question here is, whether the present document falls within the description given in Clauses 2 and 3 of Section 17, and I am of opinion that it does. I can see no difference between this case and that of *Futteh Chund Sahu v. Leelumber Singh*, reported in 14 Moore's Ind. Ap. 129. Exhibit No. 21 is an agreement to execute a deed of absolute sale. It further acknowledges the receipt of Rs. 100 as part of the purchase money Rs. 4,300, and it prescribes certain consequences in the event of either party failing to carry out the contract. It appears to me that it would operate in equity as a sale of the property, and, if duly registered, would have been sufficient for the party claiming under it to have sued on it for specific performance. If this document be taken off the record, there remains no foundation for the plaintiffs' suit. I must, therefore, reverse the decree of the lower Court, and dismiss the plaintiffs' claim with all costs.

In special appeal the only question argued, was whether Exhibit No. 21 required registration.

The special appeal was argued before WESTROFF, C. J., and MELVILL, J.

Scoble (Advocate General), with him *Bamanji Pherozesha*, for the appellants:—Exhibit No. 21 is an agreement, and falls within Section 18, Clause 7, of Act VIII of 1871. It ought not to be considered as the contract itself, but only a memorandum from which a contract may be inferred. It distinctly states that a deed of sale was to be made and delivered in future. This case, therefore, exactly falls within the rule laid down by Sir Charles Sargent in *Jusub Haji Jafar v. Haji Gul Mahamad* (1). That case fully supports the plaintiffs' contention. It was followed by Green, J., in another suit, No. 412 of 1875, decided on the Original Side on

(1) 12 Bomb. H. C. Rep. 175.

the 18th December 1875. No. 21 was merely preliminary to the main contract, which was to be executed subsequently, as appears from the writing itself. This view is supported by Bayley, J., in *Jipandas v. Framji* (1), and by Couch, C.J., in *Kedarnath Dutt v. Shamlal Khettry* (2). This case differs from the Privy Council ruling in *Futteh Chund Sahu v. Leelumber Singh* (3). In that case the whole consideration money was paid, and its receipt acknowledged in the unregistered agreement sued upon.

Marriott (with him *Shántáram Náráyan*) for the respondent:— This case is entirely governed by the Privy Council ruling just referred to. No. 21 is a contract itself, as it fixes the price and mentions the fact of the sale. It was a sale in equity. The writing, therefore, falls under Section 17, Clauses 2 and 3, because it acknowledges the receipt of Rs. 100 as part of the consideration money agreed between the parties. In *Kedarnath Dutt v. Shamlal Khettry* (4) the question was whether the writing itself was the contract, or whether it was evidence of facts which constituted the contract. The decision of Green, J., in the case cited, is based on the same principle. This case is similar to *Máhhád v. Dári* (5). The learned counsel also referred to *Joyram Gossain v. Kali Narayan Roy* (6).

Scoble (Advocate General) in reply.

The judgment of the Court was delivered by

WESTROPP, C.J.:—The instrument in regard to which the present suit is brought, and the question of registration arises, is as follows:—

“ Agreement paper, Tuesday the 12th of the month of Waisakh Shoodh, the Shak 1796, the year being called Bhav (28th April 1874), on that day to Valji Esaji and brother, Boharas, residing at Bohara Lane in Camp, Sadar Bazaar, Poona. From Mrs. J. Thomas, Madam, residing in Lascar Pet, Staff Lane, Poona. I give this agreement paper in writing as follows:—There is my tiled bungalow, No. 2436, situated at East Street Lane. The agreement for the sale thereof to you by me for Rs. 4,300, four

(1) 7 Bom. II C. Rep. 45 O. C. J.; see p. 67. (2) 11 Beng. L. R. 405.

(3) 14 Moore Ind. Ap. 129; S. C. 9 Beng. L. R. 433. (4) 11 Beng. L. R. 405. •

(5) S. A. No. 420 of 1874.

(6) 20 Calc. W. R. 291 Civ. Rul.

1876
 VALAJI ISAJI
 v.
 THOMAS. thousand three hundred, was to be made this day, but my creditor Balkrishna Sayapa has gone to Bombay. On his return after about (20) twenty days I will make and deliver a deed of sale in accordance with what is written above. Should I not make and deliver the deed of sale within that time, or on the return of the said person, I will make good whatever loss you may sustain. And Rs. (100) one hundred, which you have now paid as earnest will be (considered) as forfeited if you do not buy (it). You shall have no claim thereto, and the said Rupees one hundred which you have paid I have received in ready cash in full; therefore it is not necessary to give a receipt for the same. I have duly given this agreement paper in writing in my sound mind and of my free will and accord. The 28th of the month of April in the Christian year 1874."

The Assistant Judge was of opinion, and in that opinion we concur, that this case is governed by the decision of the Judicial Committee of the Privy Council in *Futteh Chund Sahu v. Leelumber Singh Doss*(1). The only material difference between the two cases is, that in the Privy Council case the whole of the consideration for the sale had been paid, while in the present case there has been a payment of part of the consideration only. It does not appear to us that this difference affects the question of registration. The law applicable to the question is contained in Clauses (2) and (3) of Section 17 of Act VIII. of 1871, which renders registration of the following instruments compulsory, viz. :—

"Instruments (not being wills) which purport or operate to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest, whether vested or contingent, of the value of one hundred rupees and upwards, to or in immoveable property" (Clause 2).

"Instruments (not being wills) which acknowledge the receipt or in payment of any consideration on account of the creation, declaration, assignment, limitation, or extinction of any such right, title, or interest" (Clause 3).

In the present case the instrument (Exhibit No. 21) distinctly acknowledges the receipt of Rs. 100 as part of the consideration

(1) 14 Moore Ind. App. 129; S. C. 9 Beng. L. R. 433.

for the sale of a house to the plaintiff for the sum of Rs. 4,300. 1876
 And we do not see how it is possible for the plaintiff to deny that VALAJI ISAJI
 the same instrument operates to create an interest in the house v.
 of the value of one hundred rupees and upwards. His claim THOMAS.
 is very unscientifically stated in his plaint, but we must take it
 to be of the nature of a bill by a purchaser for specific perform-
 ance, and the very foundation of such a claim is that the con-
 tract between the parties did presently operate as a sale of the
 property. If it did so operate, the contract required registration.
 If it did not so operate, the plaintiff has no case.

The learned Advocate General, in his argument for the special
 appellant (the plaintiff), has relied on a decision of Sir Charles
 Sargent in Suit No. 229 of 1874, decided 9th March 1875 (1).

The report of the judgment in that case, which has been sub-
 mitted to us, is very meagre, and we are inclined to think that it
 does not correctly represent all that the learned Judge said. But it
 is sufficient for us to say that in that case the instrument in ques-
 tion had been executed, not by the intending vendor, but by
 the intending purchaser, and, of course, therefore, could not
 operate to create any right, title, or interest to, or in, the property
 to be sold. The case of *Hargovandas Girdharil v. Balkrishna*
Kanoba (which was a suit against a purchaser), referred to at
 page 67, Vol. VII, Bombay H. C. Reports (O. C. J.), would
 (so far as we can gather from what is there said of it) appear to
 have been a case of similar nature.

The case of *Kedarnath Dutt v. Shamlal Khettry* (2) also
 relied on by the learned Advocate General, has no real bearing
 on the present case. That was the case of an equitable mortgage
 by deposit of title-deeds; and it was held that a subsequent
 memorandum, which was "not the contract for the mortgage nor
 the agreement to give a mortgage", did not require registration.

(1) *Jusab Haji Jafar v. Haji Gul Muhammad*, 12 Bom. II. C. Rep. 175. See
 also the case of *Currie v. Mutu Ramen Chetty* (3 Beng. L. R. A. C. 126) there cited,
Asgur Ali Shikdar v. Molhoora Nuth Ghose (13 Cal. W. R. 354 Civ. Rul.) follow-
 ing this latter case, and *Cowar Rajkumar Roy v. Cowar Kalikrishna Roy* (7 Beng.
 L. R. at pp. 304-5). These three cases were not referred to in *Futteh Chand Sahu's*
 case, but the decision of the Privy Council in that case seems to overrule them.

(2) 11 Beng. L. R. 405.

1876
 VALAJI ISAJI
 v.
 THOMAS.

The judgment of the Court (Westropp, C. J., and Campbell, J.) in Special Appeal No. 420 of 1874, decided 13th October 1875 (1), supports the view which we take of the present question. The reasons for that judgment are thus stated: "This Court is of opinion that the *yádi* (receipt, Exhibit No. 9) of the 18th April 1872, being unregistered, was by Section 17, Clauses 2 and 3, and Section 49 of Act VIII of 1871 inadmissible in evidence. If authority for this proposition were needed, we have it in *Fatleh Chand Sahu v. Leelumber Singh Doss* (2), decided on the similar sections of Act XX. of 1866. That exhibit (No. 9) was produced, not for the mere purpose of showing a payment, but of defending the title of Bhágai to possession of the land. The effect of the payment and acceptance of part of the consideration for the sale of the land to her, would be to give her an equitable estate in the land, and to leave to the plaintiff only a lien for that portion of the purchase money which still remained due to him. The sum of Rs. 483 (the details of which are given) is stated in the *yádi* (Exhibit No. 9) to have been paid to the plaintiff on account of the sale by him to her of the land. It is unnecessary for us to say whether, if this were merely a suit by the plaintiff for the whole amount of the purchase money, the defendant Bhágai might, in proof of a part payment, give the receipt in evidence, and we do not now give any opinion on that point. It is enough to say that in a suit to recover possession of land, such as this is, the defendant cannot defend her title or possession by such a document, unless it be registered" (3).

For these reasons we are of opinion that it has been rightly decided by the Assistant Judge that Exhibit No. 21 required registration; and, as the Assistant Judge states, as a fact, that, if this document be taken off the record, there remains no founda-

(1) The case referred to is that of *Máhád bin Dánápa v. Dári bin Bálee and others*. The facts were shortly as follows:—The plaintiff sued to recover possession of certain land from Bhágai, one of the defendants. She pleaded that he had sold the land to her, and in support of this plea tendered in evidence a "*yádi*," or memorandum, purporting to be executed by him to her, reciting the sale, and acknowledging the receipt of Rs. 483 in part payment of the price. This *yádi* bore a one-anna receipt stamp, and was not registered.

(2) 14 Moore Ind. Ap. 129. (3) See *Máhádaji v. Vyunkaji*, *infra*, p. 197.

tion for the plaintiff's suit; and, as this fact has not been 1876
 disputed before us, we confirm the Assistant Judge's decree VALAJI DESAI
 with costs on the special appellant. v.
THOMAS.

[APPELLATE CIVIL JURISDICTION.]

Special Appeal No. 113 of 1875.

MĀHĀDĀJĪ, SON AND HEIR OF VITHAL VISHWANATH DESAI (ORIGINAL March 16.
 DEFENDANT NO. 1, SPECIAL APPELLANT) v. VYANKAJI GOVIND
 (ORIGINAL PLAINTIFF, SPECIAL RESPONDENT).

*Registration—Memorandum—Receipt—Section 17 (Clauses 2 and 3) and
 Section 49 of Act XX. of 1866 and Act VIII. of 1871—Evidence—
 Practice—Special Appeal—Point not taken in either of the Lower Courts.*

A document purporting to have been passed by a mortgagee to his mortgagor and reciting the demand of the former for repayment of his mortgage money before the due date of the mortgage, and the compliance with that demand by the latter by means of a fresh loan upon a second mortgage of the same property; and reciting also the fact of the delivery of possession of the property by the original to the second mortgagee; and purporting, in conclusion, to contain a declaration by the original mortgagee that nothing remained due to him in respect of his mortgage, is a document which under Clauses 2 and 3 of Section 17 of Act XX of 1866 as well as under Clauses 2 and 3 of Section 17 of Act VIII. of 1871, requires registration, and, if unregistered, is by Section 49 of the same two Acts inadmissible as evidence of any transaction affecting any property comprised therein.

The fact of the extinction of the original mortgagee's lien may, however, be proved by other documentary or proper oral evidence.

A point not taken in either of the Lower Courts was disallowed as being too late when taken for the first time at the hearing of the special appeal.

THIS was a special appeal from the decision of A. D. Pollen, Acting Assistant Judge of Ratnágiri, in appeal No. 161 of 1874, reversing the decree of the 1st class Subordinate Judge's Court at Ratnágiri.

The plaintiff sued as the purchaser, under a deed (Exhibit 3) dated the 13th September 1871, of the interest of one Kazi Muhammad, who was the mortgagee, under a mortgage, dated 24th April 1868 (Exhibit 4), of a *thikán*, the property of the first defendant Vithal Vishvanáth Desai. The mortgage was for six years from the date of the mortgage deed, and to secure Rs. 350.

The plaintiff, alleging that the defendants had dispossessed his vendor before the sale to himself, sought to be established in

1876
MA'HA'DAJI
v.
VYANKAJI
GOVIND.

the position of transferee of that mortgage, and to be placed as such in possession of the *thikán*.

The first defendant, the mortgagor, alleged that previously to the asserted sale, by Kazi Muhammad, of his rights as mortgagee to the plaintiff, the former had, on the 24th of February 1870, been paid off in full, and the *thikán*, in order to enable the first defendant (the mortgagor) to raise the sum of Rs. 350 necessary for that purpose, had been re-mortgaged by him to the second defendant, Bálkrishna Dáji Pandit. In order to prove this defence the first defendant produced in evidence an unregistered document (Exhibit No. 17), stamped as a common money receipt and not as a re-conveyance, and dated the 24th of February 1870, purporting to be signed by Kazi Muhammad, the first mortgagee. This document stated the demand of Kazi Muhammad for re-payment of his mortgage debt, made within two years after the execution of the mortgage to him, and therefore four years before he was entitled to make it: the compliance of the first defendant with that demand, and his consequent re-mortgage to the second defendant in order to raise the money for this purpose; and the payment by the second defendant on account of the first defendant of the sum due on the mortgage to Kazi Muhammad. The document further stated that the second defendant demanded possession of the original mortgage bond executed to Kazi Muhammad; that the latter, by direction of the first defendant, handed such bond to the second defendant, and made over to him possession of the mortgaged *thikán*; and, finally, that nothing remained due to Kazi Muhammad on the original mortgage bond. This document (Exhibit 17) was admitted in evidence by the Subordinate Judge, who found it to have been signed by Kazi Muhammad, and accordingly made a decree against the plaintiff. He appealed. The Assistant Judge then held that Exhibit 17, not being registered, was inadmissible in evidence, and after stating that there was not any other evidence that Kazi Muhammad's mortgage lien had been extinguished, made a decree for the plaintiff with costs. Against that decree this special appeal was filed by the first defendant. The memorandum of appeal raised three principal questions, viz., 1st, whether the document Exhibit 17 was admissible in evidence; 2nd, whether there was evidence other

than that furnished by Exhibit 17 sufficient to support the appellant's contention; and, 3rd, whether the plaintiff's vendor having admittedly parted with the possession of the mortgaged property before the sale to the plaintiff, the latter, under the Hindu Law, took anything.

The special appeal was argued before WESTROPP, C. J., and WEST, J.

Pándurang Bálíbhadrá for the first defendant, the special appellant:—The plaintiff admits in his plaint that his purchase was subsequent to his vendor's dispossession by the first defendant, the original mortgagor and owner of the property. If so, he gets nothing by the Hindu Law, and his suit must fail.

Ganasham Nilkanth, for the plaintiff, respondent:—This objection was not taken in either of the Lower Courts, and is too late now when taken here for the first time (1).

Pándurang:—Exhibit 17 is a receipt, and need not be registered for the purpose of showing the simple fact of the re-payment of the mortgage debt to the original mortgagee: *Woodoy Chand v. Nitye Mundul* (2), *Venkatarama v. Chinnathambu* (3), *Shib Prasad v. Anna Purna* (4), *Sham Narain v. Khemajeet* (5). Oral or other evidence of the fact of the extinction of the lien of the original mortgagee independent of that furnished by Exhibit 17, is admissible, and should have been considered by the Assistant Judge.

Ganasham contra.

WESTROPP, C. J., after reviewing the facts recorded above, continued as follows:—The object of the first defendant (appellant) in giving the instrument Exhibit 17 in evidence is to show that Kazi Muhammad's mortgage lien on the land has been extinguished, and was so previously to the alleged transfer or assignment of that lien to the plaintiff; and if the document be

(1) This is the rule generally followed on the Appellate Side of the High Court: see *Ramabai v. Appa*, 12 Bom. H. C. Rep. 13. On the Original Side where the appellant won a point not taken by him in the Court below, he was ordered to pay the respondent's costs of appeal: *Haridas v. Gamble*, 12 Bom. H. C. Rep. 23.

(2) 9 Calc. W. R. 111 Civ. Rul.

(3) 7 Mad. H. C. Rep. 1.

(4) 3 Beng. L. R. 451 A. J.

(5) Calc. W. R. 11 F. B. •

1876
MAHA'DAJI
v.
VYANKAJI
GOVIND.

1876
IA'HA'DA'JI
v.
VYANKAJI
GOVIND.

genuine and admissible in evidence, it would, no doubt, be efficacious for that purpose, and a complete defence to this suit which is maintainable only on the hypothesis that the mortgage to Kazi Muhammad is a still existing and unsatisfied security.

We deem it unnecessary to enter upon the question of the sufficiency of the stamp, inasmuch as we think, whether we look to Act XX. of 1866 or Act VIII. of 1871, that the non-registration of Exhibit 17 renders it inadmissible for the purpose for which it is sought to be given in evidence in this suit.

Act XX. of 1866, Section 17, requires that the following instruments be registered :—

“ Clause 1. Instruments of gift of immoveable property.

“ Clause 2. Instruments (other than an instrument of gift) which purport or operate to create, declare, assign, limit, or extinguish, whether in present or in future, any right, title, or interest, whether vested or contingent, of the value of one hundred rupees and upwards, to or in immoveable property.

“ Clause 3. Instruments which acknowledge the receipt or payment of any consideration on account of the creation, declaration, assignment, limitation or extinction of any such right, title, or interest; and

“ Clause 4. Leases of immoveable property for any term exceeding one year.”

We are clearly of opinion that Exhibit 17 falls within Clauses 2 and 3 of this seventeenth section,—within Clause 2 because it purports to extinguish the right, title, and interest of Kazi Muhammad in the land—and within Clause 3 because it acknowledges the receipt of Rs. 350 as consideration on account of the extinction of his right, title, and interest in the land. Section 49 enacted that “no instrument required by Section 17 to be registered shall be received in evidence in any civil proceeding in any Court, or shall be acted on by any public servant as defined in the Indian Penal Code, or shall affect any property comprised therein, unless it shall have been registered in accordance with the provisions of this Act.” This clearly renders Exhibit 17 inadmissible in evidence for such a purpose, as it has been offered in evidence in this suit.

The first three clauses in Section 17 of the more recent Registration Act (VIII. of 1871) are substantially the same as the first three clauses in Act XX. of 1866, Section 17. The 49th Section of Act VIII. of 1871 enacts that "no document required by Section 17 to be registered shall affect any immoveable property comprised therein, or confer any power to adopt, or be received as evidence of any transaction affecting such property or conferring such power, unless it has been registered in accordance with the provisions of this Act." Even supposing, but not actually deciding, that, according to *Guduri v. Rapaka* (1), the law applicable to the admissibility in evidence of Exhibit 17 is the more recent Act (VIII. of 1871); yet inasmuch as that exhibit is offered in evidence for the purpose of showing a transaction whereby it is contended that the mortgage lien of Kazi Muhammad became extinguished, and thus affecting the land, we are of opinion that Exhibit 17, being one which under Clauses 2 and 3 of Section 17 ought to have been registered, but was not, is not admissible on behalf of the defendants in evidence.

1876
MAHARAJA
D.
VANKARJI
GOVIND.

Several cases have been cited to us on behalf of the first defendant in favor of the admissibility of exhibit 17; but none of them appeared to us to meet the exigency of the position.

Venkatarama v. Chinnathambu (2) was a suit by a mortgagor to recover from a mortgagee a sum paid (on redemption) to the latter in excess of what was really due to him. The claim merely affected the mortgagee personally, and the unregistered indorsement on the mortgage bond of the amount paid was not offered in evidence as a transaction affecting the land, but as proof of the amount paid. Neither party denied that the mortgage lien had been extinguished.

Guduri v. Rapaka (3), already mentioned, was a suit against the mortgagors personally for the money, the plaintiffs having waived all claims against the land.

The absence (in the report) of the documents, upon which the case quoted from 20 Calc. W. R. 334, Civ. Rul. (*Sheikh Gunganfur Ali v. Mahomed Yaseen*) was decided, prevents us from being able

(1) 7 Mad. H. C. R. 348.

(2) 7 Mad. H. C. Rep. 1.

(3) 7 Mad. H. C. Rep. 348.

1876
 MA'HA'DA'JI
 v.
 VYANKAJI
 GOVIND.

to understand that case fully. This difficulty is increased by the omission of the learned Judge, as reported, to notice the bearing of Clause 3 of Section 17 of Act XX. of 1866 upon the receipt which was there admitted in evidence. The learned Judge is, in the concluding portion of his judgment, reported as having said that the receipt did not fall within Clause 2 of that section, but he was silent as to Clause 3.

In *Máhául bin Dáuápa v. Dári* (1) my brother Kemball and I refused to permit an unregistered *yádi* to be given in evidence by a defendant in defence of her possession. The *yádi* stated that a sum of Rs. 483 had been paid to the plaintiff on account of the sale by him to her of the land. In fact, it was a receipt for money, but stated in what respect the money had been paid, namely, as part of the consideration for the sale of the land.

We agree accordingly with the Assistant Judge in holding the receipt Exhibit 17 to be inadmissible in evidence. Any other decision would, in our opinion, defeat the manifest intention of the Legislature.

But the appellant's pleader pointed out that there is some oral evidence of the payment, although the Assistant Judge has said that "the receipt is the only evidence that Kazi's mortgage lien was extinguished." The important circumstance, too, that Kazi Muhammad, before he conveyed his alleged rights as mortgagee to the plaintiff, had given up, or been put out of, possession, requires to be carefully considered and investigated. That he is and was out of possession, cannot be denied, and the burden lies upon the plaintiff, who claims under him, to explain that fact. If Kazi Muhammad voluntarily surrendered his interest as mortgagee to the first defendant, the mortgagor, or to the second defendant as his nominee, there would have been nothing left in Kazi Muhammad to pass by his subsequent conveyance to the plaintiff. The fact that Kazi Muhammad was out of possession at the date of that conveyance, lends probability to the case put forward by the first defendant, unless that fact be satisfactorily explained by evidence on behalf of the plaintiff.

The appellant (first defendant) by his *durkhast* No. 52 asked for permission to examine other witnesses, and we think that,

(1) *Supra*, p. 196 and note (1) *ibidem*.

relying, as he probably did, on his Exhibit 17 to prove his case, he may have neglected to summon as many witnesses as he otherwise would have done to show that Kazi Muhammad's mortgage had been paid off and his lien extinguished. We are of opinion that he ought to have an opportunity of proving his case by oral testimony if he can, and may summon such witnesses as he may be advised to call for that purpose, and may give such other (if any) evidence as may be available, such as books, accounts, &c., and as may be legally admissible.

There should be a distinct finding of the re-trying Court on the allegation that the plaintiff's case is fraudulent and collusive.

The seventh point in the memorandum of special appeal (*i.e.*, as to the plaintiff's vendor having been out of possession at the time of the sale to the plaintiff) not having been made in either of the Courts below, is too late.

We reverse the decree of the Assistant Judge, and remand this cause for re-trial by the District Court on the merits in accordance with the foregoing observations. Costs of both appeals and of the suit are to be within the discretion of the re-trying Court.

Decree reversed and cause remanded.

[APPELLATE CIVIL JURISDICTION.]

Special Appeal No. 18 of 1875.

PARBHUDÁS RĀYAJI AND ANOTHER (ORIGINAL PLAINTIFFS, APPELLANTS) March 27.
v. MOTIRAM KALYĀNDÁS (ORIGINAL DEFENDANT, SPECIAL RESPONDENT).

Pensions Act XXIII. of 1871—"Toda-Grás"—Decree before the date of the Act.

"*Toda-Grás*" *haks* are within the scope of the Pensions Act XXIII. of 1871; and a suit in respect of them cannot be instituted without the certificate required by Section 6 of the Act.

Where a mortgagee of such *haks* had, before the date on which the Act came into operation, obtained a decree for the recovery of his mortgage debt from the mortgaged *haks* and from the mortgagor personally, and a fresh suit was necessary to enforce execution of that decree against those *haks*.

Held that the Act did not apply to such fresh suit.

Semle that the word "right" in Section 3 of Act XXIII. of 1871 is equivalent to the word *hak* in its restricted sense of "allowance" or "fee."

1876
MAHARAJI
P.
VANKAJI
GOVIND.

1876.
 PAIBHUDAS
 RA'YAJI
 v.
 MOTIRAM
 KALYANDAS.

THIS was a special appeal from the decision of H. J. Parsons, Assistant Judge of the District of Surat, confirming the decree of the 1st Class Subordinate Judge of that place.

The material facts of the case are as follows:—The plaintiffs' father, as the mortgagee of certain *haks*, obtained against his mortgagor, Ajabsang, a decree, dated the 11th of September 1866, for the recovery of Rs. 2,569-10 from the mortgaged property and from Ajabsang personally, and in execution of such decree he attached Ajabsang's "Todá-grás" on the 28th of October 1871. Subsequently to the decree, but before the attachment, this "Todá-grás" was purchased by the defendant. The attachment was raised, at the instance of the defendant, on the 1st of February 1872. Hence the plaintiffs sued to have their right declared to the satisfaction of their father's decree by attachment of Ajabsang's "Todá-grás."

The defendant *inter alia* answered that he was not a party to the former suit, and was not, therefore, bound by the decree; that he had himself purchased the "Todá-grás" at an auction sale on the 8th of October 1867; and that the suit, having been instituted without the authority of such a certificate as is required by Section 6 of the Pensions' Act XXIII. of 1871, was not maintainable.

Both the Lower Courts allowed the defendant's objection and rejected the plaintiff's claim.

March 21.—The special appeal was heard by MELVILL and KEMBALL, JJ.

Dhirajlal Mathuradas, Government Pleader, for the plaintiff:—"Todá-grás" payment is not subject to the Pensions' Act. It is in the nature of immoveable property, the payment being originally recoverable by Grasiás from lands in villages. At any rate, it is not a grant of money or land-revenue made by the British or any former Government. "Todá-grás" was levied against and independently of the wishes of any Government. The Pensions' Act does not apply to the case of a contract, which I submit this is. The British Government in 1832, for reasons of state, entered into an express agreement with the Grasiás to pay this money them-

selves, on the latter undertaking not to recover it themselves or by their "Selots" or agents. In fact, the Government chose to become the Grasias' agents for certain reasons of their own. The present case may well be compared with that of money had and received by the Government to the Grasias' use. *Bábáji v. Rájárám* (1) is distinguishable from this. It was there held that the Legislature intended to apply the Pensions' Act to payments which were the bounty of Government. "Toda-gras" can never be construed in that sense.

1876
PARHIBUDAS
RA'YAJI
v.
MOTIRAM
KALIA'NDAS.

My second objection is, that, even if "Toda-gras" be held to be within the scope of the Pensions' Act, the Act is not applicable to this case. It came into operation on the 8th of August 1871, and the plaintiff's father obtained his decree in 1866, and attached the 'hak' before the date of the operation of the Act (2). Section 1 of the Act expressly say that it is not to affect any suit in respect of a pension or grant of money or land-revenue which may have been instituted before such date. The Act was never intended to have retrospective effect, and this was held in *Gulábdás Jagjivandas v. Lalitárám Atmárám and others* (3). The present suit was necessitated by an act of the defendant, who got the original attachment removed. So the former suit as well as this suit are part of the same proceedings: *Framji v. Hormasji* (4) *Ratanchand v. Hanmantrav* (5).

Nagindas Tulsidas for the defendant:—"Toda-gras" payment is made out of the Government Treasury, and, independently of its origin, is clearly within the scope of the Pensions' Act, which covers such payments even though made for a good consideration.

(1) 1 Ind. L. R. (Bombay) 75.

(2) The learned Government Pleader was mistaken as to the date of the attachment. Though the decree was obtained in 1866, the *hak* was not attached till October 1871, more than two months after the Act had come into force. The error, however, is immaterial, as the case turns, not on the date of the attachment, but of the institution of the suit.

(3) Mis. Sp. Apl. No. 11 of 1872 decided on 12th August 1874 by WESTROP, C. J., and KEMBALL, J.

(4) 3 Bom. H. C. Rep. 49 O. C. J. (5) 6 Bom. H. C. Rep. 166 A. C. J.

1876

PARBHODA'S
RA'YAJI
v.
MOTIRA'M
KALYA'NDA'S.

With regard to the second objection, the word suit may be construed to include an appeal, but not another suit, which it has become necessary for the plaintiffs to institute in this case.

The judgment of the Court was delivered by

MELVILL, J.:—"Toda-Gras" *haks* are thus described by the Judicial Committee of the Privy Council in *Maharana Fatosangji v. Desai Kallanrayaji* (1): "It is sufficient to state that these annual payments, though originally exacted by the *Grasias* from the village communities in certain territories in the west of India by violence and wrong, and in the nature of black-mail, had, when those territories fell under British rule, acquired by long usage a quasi-legal character as customary annual payments; and that as such they were recognized by the British Government, which took upon itself the payment of such of them as were previously payable by villages paying revenue." The Assistant Judge has held that payments of this description fall within the definition of "a grant of money or land-revenue" in Act XXIII. of 1871. We are not prepared to say that he is wrong. In opposition to this view it has been contended that the purpose of Act XXIII. of 1871 is simply "to keep the distribution of what is regarded as bounty of Government wholly in the hands of its executive officers": *Babaji v. Rajaram* (2); and that the payment of "toda-gras" *haks* by Government is not, and never was, an act of bounty. It was, no doubt, stated in the Legislative Council, in introducing the Bill that the leading principle of the main provisions of the law was that, as the bestowal of pensions and similar allowances was an act of grace or state policy on the part of the ruling power, the Government reserved to itself the determination of all questions affecting the grant or continuance of these allowances. But, whatever may have been the intention, the Act itself seems to us to have been so framed as to oust the jurisdiction of the Civil Courts in regard to other allowances than those originating in an act of grace or state policy. Section 4 speaks of allowances granted for a consideration, and in substitution for some claim or right. Section 3 defines the expression "grant of money or land-revenue" as including "anything payable on the part of Govern-

(1) 10 Bom. H. C. Rep. 281.

(2) 1 Ind. L. R. (Bombay) 75.

ment in respect of any right, privilege, perquisite, or office." These words are, as the Assistant Judge observes, exceedingly large : so large, indeed, that, if the word "right" were taken in its fullest sense, the Courts could entertain no claim against Government for any payment whatever, inasmuch as every claim must be founded on some right on the part of the claimant. The word "right" must be construed in some limited sense; and the context suggests the idea that the Legislature may have intended it as an equivalent to the word *hak*, taking the latter word in its narrow sense of "allowance" or "fee," and not in its broader sense, which is co-extensive with that of our word "right." If that be so, the question of the applicability of the Act to "todá-grás" *haks* is at once settled. But, without insisting upon what may be only a fanciful interpretation, we are of opinion upon the best consideration which we are able to give to the terms of the Act, that it was the intention of the Legislature to reserve to the Government the decision of all questions relating to such allowances as "todá-grás" *haks*.

1876
 PABHU DÁS
 RAYANI
 P.
 MATHUR
 K. MATHUR

The plaintiffs may, however, escape, by a different way, from the operation of this Act. The Act was not intended to be retrospective, and Section 1 provides that it shall not affect any suit in respect of a pension or grant of money or land-revenue which may have been instituted before the date on which it came into force. Now, the plaintiffs' father, who was a mortgagee of the *hakdār*, obtained a decree in 1866, and under that decree he attached the *hak* which had been, subsequently to his decree, purchased by the defendant. The attachment was raised on the application of the defendant, and thereupon, under Section 246 of Act VIII. of 1859, the plaintiffs brought the present suit. This was the only means open to them of giving effect to the decree. To say that they should not bring this suit, or that they should not do so without the permission of the revenue authorities, would be to deprive them of the benefit of the former suit, or, at least, to throw difficulties in the way of their obtaining that benefit; and to that extent the former suit would be affected. This seems to have been the view taken by this Court in Miscellaneous Appeal No. 11, of 1872 on the 12th August 1874. We are of opinion that, on

1876
PAIBHUDA'S
RATTAJI
v.
MATIRAM
KALYANDVS.

this ground, the plaintiffs are entitled to claim exemption from the operation of Act XXIII. of 1871.

The Assistant Judge has found that on the merits the plaintiffs are entitled to succeed. The respondent has not appealed against this finding, nor filed any statement of objections under Section 348 of Act VIII. of 1859. We must, therefore, reverse the decrees of the Courts below, and enter judgment for the plaintiffs, with costs on the defendant throughout.

Decree reversed.

[APPELLATE CIVIL JURISDICTION.]

Special Appeal No. 277 of 1868.

1868
August 6.

JOTI BHIMRAV (ORIGINAL PLAINTIFF, SPECIAL APPELLANT) v. BALU BIN BA'PUJI AND ANOTHER (ORIGINAL DEFENDANTS, SPECIAL RESPONDENTS).

Mirás—Razinámá—Abandonment of mirás right—Ejectment.

A *Mirásdár* who has given in a *razinámá* is entitled to eject the tenant put in possession of his *mirás* lands by the Collector, provided he sue within the period of limitation, and the *razinámá* contain no stipulation whereby he expressly abandons his *miras* rights.

THIS was a special appeal from the decree of the Acting Assistant Judge of Satara. The plaintiff, a *Mirásdár*, passed a *razinámá* resigning his *mirás* lands. The Collector thereupon put the defendants in possession of the lands so resigned. In a suit afterwards brought by the plaintiff to recover possession of these lands, the Assistant Judge held that a *Mirásdár* could not oust a tenant who had been put in possession by the Collector, and accordingly decreed in favour of the defendants.

The special appeal was heard by WARDEN and GIBBS, JJ.

PER CURIAM:—The Court consider that the Assistant Judge was in error in holding that a *Mirásdár* cannot oust a tenant who has been put in possession by a Collector (*vide Salu v. Ravji*, 1 Bom. H. C. Rep. 41). Not only has this Court decided to the above effect, but it has also held that a *Mirásdár* who has given in a *razinámá* has the right to recover his land if he

sues within the period of limitation, unless in that document it is expressly stipulated that he has abandoned his *miras* right. The decree of the Assistant Judge is reversed, and the case remanded for re-trial on its merits.

The Court reverses the decree of the Acting Assistant Judge, dated 4th of March 1868, and remands the cause for re-trial with reference to the above judgment. Costs to follow final decision.

Note.—It has been found impossible, after the interval of eight years that has elapsed since the delivery of the above judgment, to ascertain all the facts of the case, but from the expressions used in the judgment it would appear that the *razimā* was not before the Court at the argument of the special appeal, and that the remarks as to the effect of the wording of the *razimā* may be said to have been extra-judicial. A different opinion as to the effect of the wording of the *razimā* was expressed in the more recent case, argued and decided directly on this point, of *Tarachand v. Lakshman*, reported *supra*, p. 91.

1868.
JOH BHM-
RA'V
C.
B'ALU BH
BA'PUJI.

[ORIGINAL CIVIL JURISDICTION.]

Suit No. 254 of 1872.

CHOVA' KARA' (PLAINTIFF) v. ISA' BIN KHALIFA (DEFENDANT).

Practce—Pleading—Written statement—Variance between the case set up in the defendant's written statement and that made by him in evidence at the trial—Civil Procedure Code (Act VIII of 1859), Section 123.

1875.
August 31.

Section 123 of the Civil Procedure Code (Act VIII. of 1859) contemplates that a defendant shall, in his written statement, set forth the case he intends to make at the trial.

The rule followed in *Eshenchunder Singh v. Shamachurn Bhutto* (11 Moore I. A. 7), *Mohummud Zuhoor Ali Khan v. Massanut Thahooranee Rutta Koer* (11 Moore I. A. 468), and *Narannee v. Nurrohurry* (Marsh. 70), that a plaintiff must be held to the state of facts and equities alleged and pleaded by him in his plaint, or involved in or consistent therewith, applies also to the case made on the pleadings by a defendant.

Therefore where the defendant in a suit in ejectment averred in his written statement that the land in dispute was in fact his, but had previously to 1865 been encroached on by the plaintiff, who in 1865 was about to erect a building thereon, and that the defendant then, in order to avoid litigation, compromised the dispute by payment to the plaintiff of a sum of money, and purchased the land, and had since then remained in possession of it.

Held, that the only defence open to the defendant was that of purchase, and that he could not be allowed at the trial to prove a case of continuous user and possession adverse to the plaintiff commencing before 1865.

1875.
CHOVA' KARA'
v.
ISA' BIN
KHALIFA.

THE plaintiff and defendant are owners of two neighbouring houses in Bussara Musjid Lane. Previously to 1870 there was between these two houses a vacant piece of land. In May 1870 the defendant pulled down his old house, and commenced to rebuild it so as to cover the whole of this vacant ground. While the new building was in course of erection, the plaintiff, by a notice dated 21st May 1870, called the attention of the defendant to the fact that a strip of the vacant ground adjacent to the plaintiff's premises was the property of the plaintiff, and called on the defendant to remove his encroachment. The defendant in his reply, dated 23rd May 1870, denied that the plaintiff had any right to the land which he claimed. The plaintiff took no further steps at the time, and the defendant completed his building so as to cover the whole of the vacant ground, and abut directly on to the plaintiff's house. On 1st May 1872 the plaintiff filed this suit in ejectment against the defendant, to recover from him possession of a strip of land, now covered by a portion of the defendant's new house, alleging that such strip of land was the property of the plaintiff, that the defendant had wrongfully entered on the same in May 1870, and had erected a building thereon. The defendant, in his written statement, alleged that the land in dispute was his own, having been purchased by him, that previously to 1865 the plaintiff had encroached upon it, and in 1865 was about to erect a building thereon, when the defendant, in order to avoid litigation, compromised the dispute as to the ownership of this strip of land by paying for the same to the agent of the plaintiff the sum of Rs. 3,250.

The suit was tried by MARRIOTT, J., on 31st August 1875.

Pigot and Lang for the plaintiff.

Starling and Inverarity for the defendant.

At the hearing of the cause the evidence of the defendant and of his witnesses went to prove a case of continuous user of the land in dispute by the defendant, and the enjoyment by him of possession adverse to the plaintiff, commencing before 1865 and continuing down to the present time.

[MARRIOTT, J:—Will it not be necessary to frame an issue on the question of adverse possession?]

Starling asked that the issue might be raised.

Pigot in reply:—Such an issue ought not now to be raised. The case of user and adverse possession is wholly inconsistent with, and contradictory of, the case set up by the defendant on the pleadings. He there sets up a case of purchase, and admits that the plaintiff was in possession in 1865.

1875.
CHOVA' KARA'
v.
ISA BIN
KHALIFA.

The following is that portion of the judgment which disposes of this, the only point of law in the case:—

MARRIOTT, J.:—As I hold that the piece of land in question was purchased by and was the land of the ancestors of the plaintiff, and the defendant admits that the plaintiff represents the original purchaser, it follows that the plaintiff is entitled to a verdict, unless the defendant can show that the plaintiff has ceased to be such owner, and the defendant acquired a title as owner either by purchase or by adverse possession.

The defendant has filed his written statement, in the 1st and 2nd paras. of which he sets out his title to his dwelling-house and the land belonging thereto. In the 3rd para. he says:—“The said premises, when purchased as aforesaid by the defendant, consisted of a building with a compound at the rear thereof, and on the south side of the said compound was a vacant piece of land belonging to the plaintiff, who had also encroached, to the extent of $22\frac{1}{2}$ square yards, on the land of the defendant at the south corner of the said compound of the defendant's premises, and which said encroachment is delineated in green on a plan of the defendant's premises hereto annexed and marked C.” The land coloured green on that plan is undoubtedly the land in dispute, and the only meaning to be ascribed to the sentence—“the plaintiff had also encroached, to the extent of $22\frac{1}{2}$ square yards, on the land of the defendant”—is that the plaintiff had unlawfully intruded upon or taken possession of so much land of the defendant. There can be no encroachment without actual possession.

In the 4th para. of the defendant's written statement he says:—“In the year 1865 the plaintiff was about to erect a building on his said vacant piece of land, and also on the said $22\frac{1}{2}$ square yards encroached on by him as aforesaid, when the defendant requested one Chavu Khan Kadri, who was the sole manager or *mumim* of the

1875. plaintiff in Bombay, not to erect any building on the said 22½ square yards which the defendant claimed as his own.”

CHOVA' KARA'
v.
ISA BIN
KHALIFA.

It seems to me that no possible meaning can be ascribed to those 3rd and 4th paras. other than this—that the defendant claimed the 22½ square yards, but that the plaintiff had encroached, *i. e.*, had unlawfully taken possession thereof, and that such unlawful possession existed in 1865, when the plaintiff was about to build.

That being so, there is a distinct admission, by the written statement, of the plaintiff's possession, although unlawful, up to 1865.

The 5th para. of the written statement states that “subsequently the defendant, in order to avoid litigation, compromised the dispute as to the ownership of this 22½ square yards of land by paying Rs. 3,250 to the said Chávu Khán Kadri,” who, the para. goes on to state, on receipt thereof executed certain Gujráthi writings.

Thus the defence put forward by the written statement was that the defendant claimed the land in question as his own, but that the plaintiff was in unlawful possession, and that, in order to settle the dispute, the defendant purchased the land from the plaintiff through his agent.

At the trial the case set up was a denial *in toto* of the plaintiff's possession, and proof that the land in question always was in the possession of the defendant and his predecessors in title—in short, a case of adverse possession against the plaintiff.

At the close of the defendant's case Mr. Pigot in reply submitted that, after the defendant's admission by his written statement of the plaintiff's possession, it was not competent for him to set up the case of adverse possession.

I am not aware that such a case has ever been determined.

The 123rd section of the Civil Procedure Code provides that “written statements shall be brief, . . . but each statement shall be confined, as much as possible, to a simple narrative of the facts, which the party, by whom or on whose behalf the written statement is made, believes to be material to the case, and which he believes he will be able to prove if called upon by the Court.”

That section certainly contemplates that a defendant shall, in his written statement, set forth the case he intends to make at the trial.

In the case of *Esenchunder Singh v. Shamachurn Bhutto* (1), in which the decree of the High Court at Calcutta was founded on an assumed state of facts, contradictory to the case alleged in the plaint, and of the evidence adduced in support of it, and which decree was reversed by the Privy Council, Lord Westbury in giving judgment says:—"This case is one of considerable importance, and their Lordships desire to take advantage of it for the purpose of pointing out the absolute necessity that the determinations in a cause should be founded upon a case either to be found in the pleadings, or involved in or consistent with the case thereby made. Unfortunately in the present instance the decision of the High Court appears to be founded upon an assumed state of facts which is contradictory to the case stated in the plaint by the plaintiff, and devoid, not only of allegation, but of evidence in support of it;" and, in conclusion, he says:—"Their Lordships are obliged to disapprove of the decision that has been come to by the High Court. They desire to have the rule observed that the state of facts, and the equities and ground of relief originally alleged and pleaded by the plaintiff, shall not be departed from."

I see no reason why these observations should not be equally applicable to a defendant.

Again, in the case of *Mohummud Zuhoor Ali Khan v. Mussamut Thakooranee Ruttu Koer* (2), Sir James Colvile, in giving judgment, says:—"Though this Committee is always disposed to give a liberal construction to pleadings in the Indian Courts, so as to allow every question fairly arising on the case made by the pleadings to be raised and discussed in the suit, yet this liberality of construction must have some limit. A plaintiff cannot be entitled to relief upon facts or documents not stated or referred to by him in his pleadings."

The same rule was acted on by the High Court of Calcutta in the case of *Narainee Dossee v. Nurroohurry Mohonto* (3).

(1) 11 Moore Ind. Ap. 7; see pp. 20 and 24.

(2) 11 Moore Ind. Ap. 468; see p. 473. S. C., 9 W. R. P. C. 9. (3) Marsh. 70*.

1875.

CHOVAN' KAR.

ISA BIN
KHALIFA.

1875.
CHOVA' KARA'
v.
ISA' BIN
KUALIFA.

These cases certainly show that a plaintiff must be held to the state of facts and equities alleged and pleaded by him in his plaint, or involved in or consistent therewith, and I do not see why a defendant is not similarly bound.

In the present suit not only is the case of adverse possession not raised by the written statement, but the direct contrary is alleged. The defendant has, in his written statement, solemnly affirmed to be true that very fact which in the witness-box he solemnly affirmed to be untrue, namely, that the plaintiff was in possession in 1865, and that, too, without affecting to give any explanation of the allegations in his written statement, or why his story was altered.

The first object of Courts of Justice is, by assertion on the one side and denial on the other, to bring the parties to issue; that is, to ascertain the point in dispute between them, and upon which they are to go to trial. This was done in early times by the parties orally in open Court in the presence of the Judge; now it is done by means of written pleadings. To allow a defendant, who has affirmed or denied one state of facts by his pleadings, to affirm or deny the direct contrary at the trial, would render pleadings worse than nugatory, and make them but a means of working injustice, and would be but to encourage fraud and perjury.

I hold, therefore, that it was not competent for the defendant to set up at the trial a case of adverse possession against the plaintiff, as being in direct contradiction of his written statement, and I decline to consider the evidence adduced on that point. The only defence open to the defendant is that of purchase, and this he has failed to prove.

[APPELLATE CRIMINAL JURISDICTION.]

September 14.

REG. v. TUKAYA' BIN TAMANA'.

Criminal Procedure Code (Act X. of 1872), Sections 220, 314, and 454—Penal Code (Act XLV. of 1860), Sections 457 and 380—Simultaneous conviction of several offences—Sentence.

In a case of conviction of house-breaking by night, in order to commit theft, under Section 457, and theft, under Section 380 of the Indian Penal Code, there may either be one sentence for both offences, or separate sentences for each

offence, provided that the total punishment awarded does not exceed that which may be given for the graver offence (1), (2).

1875.

REG.

TUKAYÁ BIN
TAMANÁ.

THE prisoner Tukayá bin Tamaná was tried by Shrinivas Ballagi, Magistrate 1st Class, at Ampur, in the District of Belgaum, on two charges, viz., house-breaking by night, under Section 457, and theft in a dwelling-house, under Section 380 of the Indian Penal Code, and being convicted on both the charges, was sentenced by the Magistrate to suffer rigorous imprisonment for fifteen months as a punishment for both the offences. On a review of the Magistrate's criminal return, the High Court sent for the record and proceedings of the case, to see whether, regard being had to their ruling in *Reg. v. Haridás*, it was a material error on the part of the Magistrate, 1st Class, not to have passed separate sentences. On receipt of the record the question was considered by WEST and PINHEY, JJ., and submitted for the opinion of a Full Bench with the following remarks:—

WEST, J.:—In this case the Magistrate, having convicted the accused of house-breaking by night and of theft committed on the same occasion, has sentenced him, under Sections 457 and 380 of the Indian Penal Code, to fifteen months' rigorous imprisonment. The sentence being a single one, the case has been called for to determine whether "it was a material error not to have passed separate sentences" for the house-breaking and the theft.

In the case of *Reg. v. Haridás Shámdás* and others, disposed of on the 18th February 1875, it was ruled that, on a conviction of house-breaking and of theft, the Court is bound to pass separate sentences for each of the two offences, on each element of the joint offence. In the previous case of *Reg. v. Govindá*, disposed of on the 11th December 1873, it had been laid down in a similar case that, advertence being had to the provisions of Section 454 of the Criminal Procedure Code, the two offences were, for the purpose of awarding punishment, to be regarded as one. The accused,

(1) Similarly in the case of a conviction of several offences under Section 453 of the Criminal Procedure Code, it appears to be a matter of indifference whether several sentences are passed or an aggregate sentence, *Reg. v. Gulam Abas*, 12 Bom. H. C. Rep. 147.

(2) See the case of *Noujan*, 7 Mad H. C. Rep. 375, and the *Queen v. Nungroo*, 6 N. W. P. H. C. Rep. 293.

1875.
REG.
v.
TUKAYA' BIN
TAMANA'.

having been sentenced to imprisonment for the house-breaking, and to whipping for the theft, was made subject to a punishment (imprisonment *plus* whipping) greater than could have been inflicted upon him for the graver of the two offences, he not having been previously convicted. If a separate sentence must of necessity be passed for each offence of which an accused person is convicted, under the several heads of a multiple charge, and the sentence is in each instance to be controlled only by the law applicable to the offence regarded as standing apart from those embraced in the other heads of the charge, it does not seem that the punishment of whipping for a theft, added to one of imprisonment for a house-breaking, could properly have been regarded as illegal. In *Reg. v. Govindá*, therefore, the sentence of whipping ought to have been allowed to stand. But while Sections 220 and 314 of the Code of Criminal Procedure are not to be deprived of their intended operation, and it may be consistent with the recognition of this principle that while they are allowed without qualification to govern the ordinary cases of offences not closely connected together and forming the embodiment of a substantially single criminal intent, the provisions of Section 454 shall be held to apply, as those of a more special enactment, to the class of cases embraced within the scope of that section, and so far to act in the particular instances by way of modification of the more general earlier rules. The illustration to para. III. of Section 454 indicates that house-breaking *plus* an offence for the perpetration of which the house-breaking was committed, are regarded by the Legislature, for purposes of punishment, as one combined offence. Para. III says that the aggregate punishment is not to exceed that of the combined or graver offence, and it seems unlikely that separate sentences were meant to be insisted on, which in the aggregate could not award more punishment than could be awarded by a single sentence. The paragraph, while it speaks of separate charges for each elementary offence, says nothing of separate sentences, and its mention of "a punishment," not "punishments," seems to indicate that a single punishment by a single sentence was rather contemplated in the case of complex crimes. It is, no doubt, legal to pass sentences on each head of a charge, though those heads together go to make up a charge of a single complex offence, if these in the aggregate satisfy the provision of para. III. of Section 454; but it does not seem to

be illegal to pass a single sentence in such cases, by which precisely the same result may be obtained, and the apparent purpose of the Legislature in some instances more completely secured. But it is necessary that this question should be disposed of by a Full Bench, to which we accordingly refer it.

Accordingly the question was considered by a Full Bench, consisting of WESTROPP, C.J., KEMBALL, WEST, and NA'NA'-BHA'I HARIDA's, JJ., on the 14th September 1875.

No counsel or pleader was instructed either on behalf of the Crown or the prisoner. The following is the decision of the Full Bench :—

PER CURIAM.—There should either be one sentence for both offences in a case of conviction of house-breaking by night in order to commit theft, and theft, not exceeding that which may be given by the law for the graver offence, or separate sentences for each offence, provided that in the aggregate the punishment awarded does not exceed that which may be given for the graver offence.

1875. .
REG.
T. KAY A' BIN
TAM AN V.

[APPELLATE CIVIL JURISDICTION.]

Special Appeal No. 405 of 1875.

RAGHAPĀ BIN HANMAPĀ (DEFENDANT AND APPELLANT) v. PARĀPĀ
BIN SHIVĀPĀ (PLAINTIFF AND RESPONDENT).

1876
April 5.

The Civil Procedure Code (Act VIII. of 1859), Section 119—Ex parte decree.

The Court of first instance refused to receive the defendants' written statement, because it had been tendered after the day on which the Court had ordered it to be filed, and the delay had not been satisfactorily explained. The Court, however, framed the issues in the presence of the defendants' pleader, who was also permitted to cross-examine the plaintiff's witnesses. The Court made a decree in favour of the plaintiff. In appeal, the District Judge held that the decree of the first Court was *ex parte*, under Section 119 of the Civil Procedure Code, and that, therefore, no appeal lay.

Held by the High Court in special appeal that the decree of the first Court was not *ex parte* under the circumstances.

THIS was a special appeal from the decision of W. Sandwith, District Judge of Dharwar, reversing the decree of the Subordinate Judge of Gadak.

Parāpā bin Shivāpā brought this suit against Raghapā and

1876. Gadgeápá. Neither of the defendants appeared either in person or by a pleader on the day (1st February 1875) which was fixed for them to appear and file their written statements. On the 9th March 1875, however, a written statement was tendered on behalf of Raghapá. The Court declined to receive it, on the ground that it had not been presented on the day fixed, and the delay had not been satisfactorily accounted for. The Court, however, framed the issues in the presence of the defendants' pleader, who was also allowed to cross-examine the plaintiff's witnesses. The Subordinate Judge passed a decree in favour of the plaintiff. In appeal the District Judge raised a preliminary issue whether an appeal lay in the case, and held that as the defendants' written statement had not been received by the Subordinate Judge because not presented at the proper time, the judgment of the first Court was *ex parte* within the meaning of Section 119 of the Civil Procedure Code, and that therefore, no appeal lay. The District Judge accordingly dismissed the appeal, citing *Syud Mahomed Hossein v. Shaik Muntozul Hug* (1) in support of his decision.

The special appeal was argued before WESTROPP, C.J., and KEMBALL, J.

Máneksháh Jehángirsháh for the appellant:—The defendant was present in Court with his *vakil* on the day when the issues were settled, and tendered a written statement which the Court refused to receive. His pleader cross-examined the plaintiff's witnesses. The decree, therefore, cannot be said to have been *ex parte*. An appeal consequently lies in such a case.

Dinkar Gangádhár for the respondent:—The defendant was absent at the first hearing. His written statement was tendered at the second hearing, which was fixed for the settlement of issues. The decree, therefore, was *ex parte*, and no appeal lies.

WESTROPP, C.J.:—There were issues settled in this cause in the presence of the defendants' pleader, who, moreover, was permitted to cross-examine and did cross-examine the witnesses. Hence there is no ground for maintaining that the decree of the Subordinate Judge was *ex parte*. We reverse the decree of the District Judge, and direct him to proceed to hear the appeal on the merits. Costs of the special appeal to abide the result.

(1) 18 Cal. W. Rep., 400 Civ. Rul.

[APPELLATE CRIMINAL JURISDICTION.]

REG. v SHIVYÁ, SON OF BHAGWA, AND THREE OTHERS.

1876.
April 5.

Confession—The Code of Criminal Procedure (Act X of 1872), Sections 122 and 346—Memorandum—Certificate.

A confession recorded under Section 122 of the Code of Criminal Procedure to be admissible in evidence must not only bear a memorandum that the Magistrate believed it to have been voluntarily made, but also a certificate, under Section 346 of the Code, that it was taken in the Magistrate's presence and hearing and contains accurately the whole of the statement made by the accused person.

No oral evidence can be received to prove the fact of the confession, if the confession itself be inadmissible. *Reg. v. Bai Ratan* (10 Bom. H. C Rep. 166) followed.

THE four accused persons were tried for the offence of murder before W. H. Crowe, Joint Session Judge of the District of Belgaum at Kuládgi, and sentenced to death.

When arrested, some of the accused were taken before a Magistrate of the 3rd Class, and statements, in the nature of confessions, signed by the accused who made them, were recorded. The Magistrate attached to their confessions a memorandum stating that he believed them to have been voluntarily made, but not the certificate required by Section 346 of the Criminal Procedure Code. The accused were afterwards placed before the same Magistrate for the preliminary inquiry, when two of them retracted their former confessions. The Magistrate examined all the accused in the manner provided by Section 346 of the Criminal Procedure Code, and to such examination annexed the certificate required by that section, and committed all the accused, who were subsequently found guilty, and sentenced as stated above.

The case was heard by MELVILL and WEST, JJ.

Purcell, with him *Ghanasham Nilkanth*, for the appellants:—
The confessions are inadmissible in evidence for want of the certificates, required by Section 346 of the Code of Criminal Procedure, that they were made in the Magistrate's presence and hearing and contain accurately the whole of their statement. Section 122 of the Criminal Procedure Code enacts that "such confessions shall be taken in the manner provided in Sections 345 and 346 ;"

1876.

REG.
v.
SHIVIA'.

and para. 2 of the latter section provides that the Magistrate shall certify these particulars under his own hand. These provisions should be liberally construed in favour of the accused, as they embody important safeguards. The confessions of Nos. 2 and 3 were, moreover, retracted before their committal: *Reg. v. Garibad Bechar* (1). [WEST, J.—The prisoner in that case retracted his confession before he made his signature. Can you show any case where a confession retracted after it had been assented to by the prisoner, and duly signed both by him and the Magistrate, was held inadmissible?] I cannot. [MELVILL, J.:—We think the case you cite applies only to a single statement made by the accused, and a retraction of it before his signature.]

Shántarām Nārāyan for *Dhirājlal Mathurādās*, for the Crown:—Section 122 contemplates confessions being taken, and recorded by one Magistrate and forwarded to another by whom the case is enquired into or tried. Here the confessions were taken by the same Magistrate who committed the accused, and the whole of the proceedings before him should be regarded as one continuous proceeding. The use of the word “taken” in Section 122 is important as showing that though a confession is to be in the form of question and answer, as provided for in para. 1 of Section 346, yet that the certificate is not necessary. The case of *Bai Ratan* (2) now makes it necessary that the confession shall be signed or attested by the accused. And, lastly, the confessions in this case do bear the necessary certificates; for when the accused were again examined by the Magistrate before committal, he appended these certificates, which must be taken to relate also to their previous statements.

[WEST, J.:—The certificates are appended to the examination of the accused, which contains their retraction of their confessions; and it would be unreasonable to take them to apply to anything else.]

The judgment of the Court was delivered by

MELVILL, J.:—In this case it is admitted that if the so-called confessions of three of the prisoners be excluded from consideration,

(1) 9 Bom. H. C. Rep. 344.

(2) Bom. H. C. Rep. 166; see also *Reg. v. Dayā Anand*, 11 Bom. H. C. Rep. 44.

the convictions cannot be sustained. In fact, there is no other evidence of the smallest value in the case. These confessions were recorded by a Magistrate of the 3rd class under Section 122 of the Code of Criminal Procedure. They are signed by the prisoners, and the Magistrate has made on them the memorandum required by Section 122, certifying his belief that the confessions were voluntarily made. Several objections have been taken to the admission of these confessions, but the only one which requires serious consideration is the following. Section 122 requires that confessions recorded under that section shall be taken in the manner prescribed in Sections 345 and 346. One of the provisions of Section 346 is that the Magistrate shall certify under his own hand that the examination was taken in his presence and in his hearing, and contains accurately the whole of the statement made by the accused person. It is contended that the words above quoted from Section 122 render it necessary that the certificate mentioned in Section 346 should be attached to confessions recorded under the former section. On the other hand, it is argued that the memorandum as to the voluntary nature of the confession is all which the law requires, and that if the certificate mentioned in Section 346 be necessary, it does, in fact, appear upon the documents. The latter of these two arguments may be at once dismissed. It happened that the Magistrate, who took the confessions, became afterwards the committing Magistrate, and nearly a month after he took the confessions he examined the prisoners previously to committal. To their examination he attached the certificate required by Section 346; but it is quite clear to us that this certificate was not intended by him to apply to the previous confessions. The only question, then, is, whether the words of Section 122, "such confessions shall be taken in the manner provided in Sections 345 and 346," include the provision of Section 346, which requires the Magistrate's certificate. The loose and inaccurate phraseology of the two sections has already given us much trouble in *Bai Ratan's* case (1). One of the points decided in that case was that the words quoted from Section 122 incorporate into that section the provision of Section 346, which requires that the accused person shall sign the record of his examination. We are now

1876,
R. G.
SILVIA.

(1) 10 Bom. H. C. Rep. 166.

1876. — of opinion that the same words must be so liberally construed as
Reg — to embrace that provision of Section 346 which relates to the
SHIVAJI. Magistrate's certificate. We believe that it was the intention of
the Legislature to provide the same safeguards against the admission of confessions improperly taken under Section 122 as are provided for examination under Section 346. We cannot conceive that a less degree of protection to the accused should have been thought necessary; on the contrary, all the precautions required to guarantee the accuracy of an examination made in open Court, at a late period of the proceedings, when the accused has heard the evidence against him, and has had time to consider his defence, must be far more necessary when the statement to be guaranteed is a confession made in the first bewilderment of an arrest, and while the accused is still in the exclusive custody of the police. The question may be looked at from another point of view. The law allows certain presumptions as to certain documents, and on the strength of these presumptions dispenses with the necessity of proving by direct evidence what it would otherwise be necessary to prove. One of these presumptions relates to confessions. Section 80 of the Evidence Act provides that, whenever any document is produced before any Court, purporting to be a statement or confession by any prisoner or accused person, taken in accordance with law, it shall be presumed that such statement or confession was duly taken. Now it is evident that, as a necessary basis for this presumption, the document must purport to show all the facts of which it would otherwise be necessary for the Court to be satisfied by direct evidence, before the confession could be used against the accused. What are those facts? First, as a matter of course, the Court would have to be satisfied that the confession was accurately taken down or repeated. Next, it would be necessary to prove that the confession had been taken in the immediate presence of a Magistrate; because, otherwise, the accused person having been in the custody of the police the confession would be legally inadmissible. For the same reason it would be necessary to show that no inducement had been held out to the accused by threat or promise or otherwise. If, then, these three facts—viz., the accuracy of the record, the presence of a Magistrate and the voluntary nature of the confession—would otherwise have

to be proved by direct evidence, they must all be stated on the face of the document, before the Court can draw a presumption of their having occurred; and these are the very three facts which are stated in the memorandum and certificate mentioned in Sections 122 and 346 respectively. This consideration leads us irresistibly to the conclusion that the Legislature must have intended that both the memorandum and the certificate should be attached to such confessions. The necessity of both these guarantees could not be better illustrated than by the confessions in the present case. All that is certified upon them, is that the Magistrate upon enquiry had reason to believe that they were made voluntarily. But there is nothing to show where, or by whom, or under what circumstances, they were recorded. For all that appears to the contrary, they may have been drawn up by the police, and then taken to the Magistrate for his certificate. We do not mean to suggest that this was the procedure, but the Magistrate's certificate that he believed the confessions to be voluntary is quite consistent with it. We have held in *Bai Ratan's* case (1) that when a confession taken under Section 122 is inadmissible in evidence, oral evidence to prove that such a confession was made, or what were the terms of the confession, is inadmissible also. We must, therefore, absolutely reject the confessions in this case, and as there is no other evidence, we must reverse the convictions. We do so with the less regret, because, even had the confessions been admissible, they are so full of reservations, contradictions, and inconsistencies, that we think we should have agreed with the assessors in acquitting the prisoners.

1876.
REG.
v.
SHIVAY.

[APPELLATE CRIMINAL JURISDICTION.]

REG. v RĀMĀ BHIVGOWDĀ.

April 12.

*The Code of Criminal Procedure (Act X. of 1872), Sections 314 and 18—
Combined sentence for several offences—Confirmation—Appeal.*

The aggregate of the sentences passed under Section 314 of the Code of Criminal Procedure in a case of simultaneous convictions for several offences, must be considered a single sentence for the purposes of confirmation or appeal.

(1) 10 Bom. II. C. Rep. 166.

1876.
REG.
v.
RAMESH
GOWDA.

THE accused was tried and convicted of three several thefts by A. D. Pollen, Assistant Session Judge of Ratnagiri, and sentenced to three years' rigorous imprisonment for each offence, making in all a period of nine years.

An appeal was made directly to the High Court, the Assistant Judge not having passed the sentences subject to the confirmation of the Court of Session. The Session Judge also was of opinion that the sentences required no confirmation by himself.

The appeal came on for hearing before MELVILL and WEST, JJ.

Neither the appellant nor the Crown was represented.

PER CURIAM:—The Court consider that the combined sentence passed under Section 314 of the Code of Criminal Procedure, in a case of simultaneous convictions for several offences, must be considered a single sentence for the purposes of confirmation or appeal. The sentence of nine years' rigorous imprisonment in the present case, therefore, requires confirmation by the Session Judge (Section 18). The proceedings are accordingly forwarded to the Session Judge for his order. Should he confirm the sentence wholly or in part, he should return the proceedings to this Court, in order that the appeal may be disposed of.

Order accordingly.

Note.—So held in *Reg. v. Gulám Abás* (12 Bom. H. C. Rep. 147).

[APPELLATE CIVIL JURISDICTION.]

Regular Appeal No. 48 of 1873.

VERIBHA'I AND ANOTHER (DEFENDANTS, APPELLANTS) v. RAGHA'BHA'I
AND OTHERS (PLAINTIFFS, RESPONDENTS).

1876.
June 14.

And Regular Appeal No. 53 of 1873.

RAGHA'BHA'I AND OTHERS (PLAINTIFFS, APPELLANTS) v. VERIBHA'I
AND ANOTHER (DEFENDANTS, RESPONDENTS).

*Narvādāri or Bhāgdāri village—Partition among Narvādārs or Bhāgdārs—
Bombay Act V. of 1862.*

There is nothing in Bombay Act V. of 1862 which debars a Civil Court from making a decree for the partition of *Narvādāri* land among the *Bhāgdārs*, even though such partition may cause a further division of recognized subdivisions of *Bhāgs*.

THESE were special appeals from the decision of R. B. Bholanāth Sarābhāi, 1st Class Subordinate Judge at Kheda, who partially awarded the plaintiffs' claim.

The material facts of the case are as follows:—The parties to the cause are the holders of shares in the village of Nesrāyā, which is held on what, in the Kaira and Ahmedabād Collectorates, is called the *Narvādāri*, and in the Broach Collectorate the *Bhāgdāri* or *Bhāgdvāri* system (1), the essential features of which are that the lands of *Narvā* villages are divided into certain large divisions (from 2 to 7), called *Bhāgs* or *Patees*; and these are subdivided into smaller parcels (from 10 to 200) called *Rupees*, *Annas*, *Paghrees*, or *Pāns*; and these again into fractional parts. The superior *Bhāgdārs*, or holders of shares, are collectively responsible for all demands of public revenue; and the inferior *Bhāgdārs* are collectively responsible for that portion of the revenue which is assigned to their *Bhāgs*. The shares or divisions, both major and minor, are sometimes of equal

(1) For a full exposition of this system see the case of *Raiji Narottam v. Parushottam Gurdhar* (2 Bom. H. C. Rep., pp. 233 *et seq.* 2nd Ed., 244, 1st Ed.) and pages 27 to 35 of E. P. Robertson's Glossary of Guzerāti Revenue and Official Terms.

1876.
 VELJIBHA'I
 AND ANOTHER
 v.
 RAGHA'BHA'I
 AND OTHERS

amount, and sometimes of unequal, but always in a known and recognized proportion, so that the revenue due by the whole village may be exactly apportioned among them. The five plaintiffs and the two defendants are co-owners of five one-anna shares in the Nesráyá village. The former, in their plaint, alleged that, in consequence of defendant No. 2, who is the son of defendant No. 1, collecting more rent than was due, they suffered a loss, and they, therefore, prayed for a partition of the lands held between them, and for a share of the profits for 1867-68 and 1868-69. The defendants contended, *inter alia*, that Bombay Act V. of 1862 was enacted with the express object of preventing recognized subdivisions being further divided among the *Bhágdárs* or alienated to strangers.

The Lower Court allowed this objection, and rejected the plaintiffs' claim for partition for the following reasons:—

“The fifth, that is to say, the last section of the aforesaid Act provides that no further division shall be made of the *Bhágs* or recognized subdivisions of the *Bhágs* in *Bhágdári* or *Narvádári* villages. Such is the provisions in the said Act. As, by making a further division of the recognized *Bhágs* or subdivision of *Bhágs* in *Narvádári* villages, difficulties are liable to be thrown in the revenue management of the Government and the general management of the *Narvádárs*, the Government has passed a law to prevent a further dismemberment of the recognized *Bhágs* stated above. Therefore, the object of the Act will be frustrated by allowing further partition among the parties of the land in dispute. At first I was of opinion that this Act did not apply to a case of partition as among the *Bhágdárs* themselves, but upon a further consideration of the object of the Act my opinion changed. The law prohibits, that is to say, forbids the making of a further partition into shares of the recognized *Narvā Bhágs* alike, whether by private mode or by a process of the law.”

The Lower Court allowed Rs. 1,643-13-0 for profits as claimed.

Each party appealed against this decision; the defendants against the award of profits, and the plaintiffs against the rejection of their claim for partition.

The appeals were heard by MELVILL and KEMBALL, JJ.

1876.

Khanderav Moroji, for the plaintiffs, contended that there was nothing whatever in the Bombay Act V. of 1862 to prevent a partition of subdivisions of *Bhāgs* for the benefit of the *Bhāgdārs* among themselves; and the Court called on the counsel for the defendants to support the decision of the Lower Court on that point.

VERIRRAVI
AND ANOTHER
v.
RAGHABAI
AND OTHERS.

P. M. Mehta (*Nagindās Tulsidās* with him) for the defendants:—The object of passing the Act was to preserve the permanence of the *Bhāgdāri* and *Narvādāri* tenures, which had existed from time immemorial, and which was endangered by the process of the Court; and it was thought desirable to prevent the alienation, assignment, mortgaging, charging, or encumbering of any *portion* of any *Bhāg* other than a recognized subdivision. The use of the word *portion* in the preamble and in Section 3 of the Act, which declares that it shall not be lawful to alienate, assign, mortgage, or otherwise charge or encumber any *portion* of any *Bhāg* or share in any *Bhāgdāri* or *Narvādāri* village other than a recognized subdivision, is remarkable as showing that in no case recognized subdivisions were to be further divided. And in Section 5 the Legislature in distinct terms says, “the object and intention of this Act being to prevent the dismemberment of *Bhāgs*, or shares, or recognized subdivisions,” the profits might be divided, but the recognized subdivisions of lands were to remain intact. The *Bhāgdārs* might, if they liked, come to any understanding they chose, but the Court could not assist them in dismembering the recognized subdivisions.

MELVILL, J., in delivering the judgment of the Court, said:—We are of opinion that there is nothing in Bombay Act V. of 1862 which debars a Civil Court from making a decree for the partition of *Narvādāri* land among the *Narvādārs*. It is possible that the revenue authorities might object to execute such a decree, but the plaintiffs inform the Court that they do not anticipate such objection, and they are content to take a decree for partition. They have proved their right to four and a half out of the five shares held by themselves and the defendants, and also to the

1876. mesne profits claimed by them, and we, therefore, amend the
 VERIBHA'I decree of the Court below, and award the plaintiffs' claim in full,
 AND ANOTHER with all costs on the defendants throughout.
 2.
 RAGHA'BHA'I
 AND OTHERS.

Decree accordingly.

[APPELLATE CRIMINAL JURISDICTION.]

Criminal Review.

June 14.

REG. v. HANMANT GAVDA'.

Cotton—Adulteration—Possession—Bombay Act IX. of 1863, Section 2.

Possession of adulterated cotton, even though accompanied by a knowledge that the cotton is adulterated, is not sufficient to sustain a conviction of fraudulent adulteration or deterioration of cotton under the Cotton Frauds Act (Bombay Act IX. of 1863). No criminality attaches to such possession till the cotton is actually offered for sale or compression.

THIS was an application for a revision.

The accused Hanmant Gavda' was tried and convicted by Rāv Sāheb Bhīso Bhīmāji, 2nd Class Magistrate of Gadag, in the Kalādgi District, under Section 2 of Bombay Act IX. of 1863 (1) for adulterating cotton, and sentenced to three months' rigorous imprisonment and a fine of Rs. 100, or, in default, to one month's rigorous imprisonment. It was further ordered that the cotton, which formed the subject of the conviction, should be confiscated and sold, and the proceeds credited to Government.

(1) Whoever adulterates or deteriorates cotton by mixing therewith any seed, dirt, stones, or other foreign matter, or who fraudulently or dishonestly mixes cleaned and uncleaned cotton, commonly called cuppas, or cotton of different varieties in one bale, or who fraudulently or dishonestly, by exposing cotton to dew or by any other means, deceptively increases, or attempts to increase, the weight of the same, shall be punishable, on conviction, with imprisonment of either description for a term not exceeding twelve months, and shall also be liable to fine. All cotton so adulterated or deteriorated, or fraudulently mixed or deceptively increased in weight, and which has formed the subject of such a conviction, shall be confiscated.

Against this sentence an appeal was made to Mr. Waddington, Magistrate, F. C., duly empowered to hear appeals, who, in disposing of the objection raised by the accused that it was not proved that he had adulterated the cotton, gives the facts of the case as well as the reasons for confirming the conviction and sentence, thus:—

“The cotton was undoubtedly found in a room belonging to the appellant and his mother jointly. The appellant denies that the cotton was put there by him or belongs to him, and attempts to shift the blame of being in possession of this adulterated cotton on his mother Sheshavá. Sheshavá herself was made an accused in the case, and, evidently to screen her son, she stated that she and her son lived quite separately, that the cotton was hers, and that she had the cotton ginned and packed in *dokras*. The trying Magistrate not only convicted Sheshavá upon her confession and upon the other evidence, but also convicted the appellant, as he (the trying Magistrate) considered it clearly proved that the appellant and his mother were the joint owners of the cotton, that the cotton was adulterated as described in Section 2 of the Act (Bombay Act IX. of 1863), and that this adulteration was effected by the appellant and Sheshavá conjointly. There is, it is true, no *direct* evidence as to the appellant having *personally* adulterated, or caused to be adulterated, the cotton in question (that the cotton is adulterated by an admixture of dirt and seed is not even denied by the appellant); and, in fact, it would be simply unreasonable to expect that the Cotton Department should bring forward actual eye-witnesses of the ginning and packing of cotton which may be seized by the Department; but under ordinary circumstances, when cotton in considerable quantities is found in *dokras* in a man's possession, and such cotton is found to be adulterated, the natural presumption is that that man is the person who adulterated the cotton, or caused it to be adulterated, and then had it packed. * * * *

His defence as to his mother living separately, and having different interests, falls completely to the ground; while his denial as to the whereabouts of the cotton (which was found in a room belonging to him) and the clumsy attempt to conceal it by closing up the door of the room, indicate distinctly a guilty knowledge on the part of the appellant.”

1876.

R. C.

HANSARD
(GAYDAR)

1876.

REG.
v.
HANMANT
GAVDA.

Dissatisfied with the result of the appeal, the accused applied to the High Court to review the case, and this application was heard by MELVILL and KEMBALL, JJ.

Káshinath Trimbak Telang (with him *Ghanasham Nilkuntli*) for the accused:—There is no legal evidence of fraudulent adulteration. The circumstance that adulterated cotton was found in the possession of the prisoner's mother, or of the prisoner himself, is not sufficient to prove that he had adulterated it. At the most, it may amount to guilty knowledge, but not more.

Dhirajlál Mathurádás, Government Pleader, for the Crown:—The prisoner, when challenged by the cotton inspector as to whether there was any cotton in his house, denied that there was any, and said that grain only had been stored in the room where cotton was subsequently discovered. This not only raises a presumption of knowledge that the cotton was adulterated, but that the prisoner himself had adulterated it. It is something more than mere possession of adulterated cotton.

The judgment of the Court was delivered by MELVILL, J:—Assuming that there is evidence on the record to prove that the cotton was found in a room occupied jointly by the prisoner and his mother, and assuming that this fact is sufficient to constitute possession by the prisoner, we still think that such possession, even though accompanied by a knowledge that the cotton was adulterated, would not be sufficient to sustain a conviction. The Magistrate says:—"There is, it is true, no *direct* evidence as to the appellant having *personally* adulterated, or caused to be adulterated, the cotton in question (that the cotton is adulterated by an admixture of dirt and seed is not even denied by appellant), and, in fact, it would be simply unreasonable to expect that the Cotton Department should bring forward actual eye-witnesses of the ginning and packing of cotton which may be seized by the Department; but, under ordinary circumstances, when cotton in considerable quantities is found in *dokras* in a man's possession, and such cotton is found to be adulterated, the natural presumption is that that man is the person who adulterated the cotton, or caused it to be adulterated, and then had it packed." This is as much as to say that the mere possession of adulterated cotton is

sufficient for a conviction. If that were so, Bombay Act IX. of 1863 would, no doubt, have said so in distinct terms. If possession, and nothing more, were sufficient to bring a person within the penalties provided in Section 2 of the Act, it would have been useless to enact the penalties provided by Sections 3 and 8 of the Act for fraudulently offering adulterated cotton for sale or for compression. The possession of stolen goods soon after the theft justifies a presumption that the person in possession is either the thief or has received the goods, knowing them to be stolen (Section 114, Evidence Act). If the same analogy be applied to the possession of adulterated cotton, the legal presumption is not necessarily that the person in possession adulterated the cotton; it is an equally admissible presumption that he received the cotton, knowing it to have been adulterated. In the latter case there would certainly be nothing in the provisions of Bombay Act IX. of 1863 under which such receipt would be punishable. In the present instance it is just as likely that the prisoner bought dirty cotton from the cultivators, intending to sell it as good cotton, as that he adulterated it himself; but if that were so, there is nothing in the law which would make him liable to punishment, until he offered it for sale or compression. It is very desirable that the Magistrates and the officers of the Cotton Department should understand that they are not justified in seizing and confiscating dirty cotton wherever they may find it, or in punishing persons against whom nothing more is proved than that they had dirty cotton in their possession. These observations are sufficient to dispose of the conviction against the prisoner, which is accordingly reversed.

Conviction and sentence reversed.

1876.

RIG
P.
HAMMANF
GAYDA.

[ORIGINAL CRIMINAL JURISDICTION.]

1876.
July 22.

REG. v. LALUBHA'I GOPALDASS AND OTHERS.

High Court Criminal Procedure Act (X. of 1875), Sections 32 to 37—Hindu prisoner—Constitution of jury.

A prisoner not being a European British subject, who is not charged jointly with a European British subject, is not entitled, under the provisions of the High Court Criminal Procedure Act (X. of 1875), to be tried by a jury of which, at least, five persons shall not be Europeans or Americans.

THE four prisoners, who were all Hindus, were charged at the Criminal Sessions, at which Green, J., presided, in July 1876, with having given false evidence in a judicial proceeding and with abetment of that offence, and were jointly tried by a common jury. After the prisoners had claimed to be tried, and before the names of any of the jury had been called, *Inverarity*, who appeared for the defence, applied that the jury should be so constituted that, at least, five persons should not be Europeans or Americans. He contended that Section 37 of the High Court Criminal Procedure Act (X. of 1875) impliedly conferred on a prisoner, not being a European British subject, the right to have the jury so constituted.

GREEN, J., refused the application, holding that the section referred to conferred no such right as was contended for, unless, perhaps, in the case of a person who was not a European British subject being charged jointly with one who was, and directed that the jury should be selected in the mode ordinarily observed in the case of the trial of Hindu prisoners.

This was accordingly done by the Clerk of the Crown drawing five names from a box containing the names of those who had been summoned as Europeans and Americans, and one name from each of four other boxes, which contained, respectively, the names of those who had been summoned as Portuguese and Indo-Britons, Hindus, Muhammadaus, and Parsis. This is the mode which has been observed since the coming into force of Act X. of 1875. Before that time the practice was regulated by Rule XII. of the Crown Office Rules (Mackenzie's Rules of the Supreme Court, p. 155, para. 522) which was as follows:—"The name of each man,

who shall be summoned for the Petit-Jury, with his place of abode and addition, shall be written and delivered to the Clerk of the Crown as aforesaid, and placed in a box, and the said names shall be drawn as aforesaid, and the twelve persons whose names shall be first drawn, of whom six shall be British subjects, that shall appear and shall not be challenged, or set aside or excused, shall form the Petit-Jury on each trial; provided also that, on the trial of any person who professes the Christian religion, the twelve persons professing that religion whose names shall be first drawn, that shall appear, and shall not be challenged, or set aside or excused, shall form the Petit-Jury on such trial." The mode in which that rule has been usually carried into effect in the Supreme and High Courts, for at least the last quarter of a century, has been to draw six names from a box containing names of Europeans, three from a box containing names of Hindus, and one each from three boxes containing, respectively, names of Portuguese, Muhammadans, and Parsis. The jury of nine, constituted in the manner above described, were unanimous in finding all the prisoners guilty. After verdict, and before the prisoners were called upon to answer why sentence should not be passed upon them, *Inverarity* applied, under Section 101 of the High Court Criminal Procedure Act (X. of 1875), and Clause XXV. of the Letters Patent of 1865, to have reserved the question whether the jury had been properly constituted, having regard to his previous application, that the prisoners might be tried by a jury of which at least five persons should not be Europeans or Americans, or both Europeans and Americans, under Section 37 of the same Act. He also at the same time moved in arrest of judgment.

GREEN, J., reserved the question as to the constitution of the jury, but refused the motion in arrest of judgment, and sentenced the prisoners, respectively to two years' rigorous imprisonment.

The question so reserved was accordingly considered by a Full Bench consisting of WESTROPP, C. J., SARGENT and GREEN, JJ., on 22nd July 1876.

Inverarity for the prisoners:—Sections 32 to 37, both inclusive, of Act X. of 1875 are those which apply to the present case. From these sections it appears to have been the intention of the

1876
REG.
P.
LALUBHAI
GOPALDASS
AND OTHERS.

1876.
 REG.
 LATULHA'I
 GOPALDAS
 AND OTHERS

Legislature that the majority of the jury, in every case, and certainly in the case of a prisoner not being a European British subject, shall be other than Europeans or Americans. Section 35 even seems to show that the intention was that the whole jury shall ordinarily be composed of persons other than Europeans or Americans, and that it is only in the case of the prisoner being a European British subject, and claiming to be tried by a mixed jury, that Europeans and Americans may be introduced into the jury.

[SARGENT, J.:—Look at Section 33. That shows that the jury is ordinarily to be chosen by lot, in which case it might happen that they would be all Europeans, or all persons other than Europeans or Americans. Then Section 35 is enacted apparently to insure a prisoner who is a European British subject, being tried, if he so wishes, by a mixed jury, the majority of which shall be Europeans or Americans or both.]

[WESTROFF, C.J.:—Section 35 is a provision for the obtaining of a particular majority in a particular case. Any other case must be governed by the provisions of the Act and the old practice of the Court so far as it is consistent with those provisions.]

From the right conferred by Section 35 on a European British subject to be tried by a mixed jury, of which the majority shall be Europeans or Americans or both, it is to be inferred that a prisoner, not being a European British subject, has an equivalent right to be tried by a mixed jury, the majority of which shall not be Europeans or Americans or both. The old practice was to try a person, not being a European British subject, by a mixed jury consisting of six Europeans and six Hindus, Portuguese, Muhammadans, and Parsis. This is important, as showing that, before the passing of this Act, a prisoner, not being a European British subject, was not tried by a majority of Europeans.

[WESTROFF, C. J.:—He might have been. The rule prescribed that there should be six British subjects on each jury of twelve persons, but did not contain any direction as to the nationality or creed of the other six, when the accused was not a Christian. The usual practice, indeed, in such a case was only to have six Europeans, unless there was a scarcity of other jurors caused by challenge or otherwise.]

No new rules have yet been made on this point under Section 49 of the High Court Criminal Procedure Act, and, therefore, the old practice before the passing of this Act ought to be considered. The presiding Judge refused the application at the time of the trial, and the result was that a jury was sworn, of which the majority were Europeans.

1876.
REG.
LALL BHAI
GOPAL DASS
AND OTHERS

Purcell (who with *Lang* appeared for the Crown), in reply to a question by the Court, stated that there was no decided case on the point yet reported. He was not called on to support the conviction.

WESTROPP, C.J. :—We think that, even if the Legislature intended what Mr. Inverarity contends it did, it has not expressed that intention, and this would be a case of *quod voluit non dixit*. We also think, however, that it had no such intention. Where it wished to make a rule about the selection of jurors for the trial of European British subjects, we find it doing so in express terms in Section 35. If Mr. Inverarity's contention were well founded, that the Legislature did intend that a prisoner not being a European British subject should be tried by a jury, of which the majority should be other than Europeans or Americans or both, we should have expected, after reading Section 35, to find another section expressly conferring an equivalent right on persons not being European British subjects. There being no such section, it seems to us that the contrary inference to that for which Mr. Inverarity contends is the one that should be drawn from the express provisions of the Act. The concluding passage in Section 36 shows that, even after a European British subject has claimed the right given to him by Section 35 to be tried by a jury of which the majority shall be Europeans or Americans or both, the person who is accused jointly with him, though not a European British subject, may yet be tried together with him, and, therefore, of course, by the same jury. Lastly, Section 37 provides that if the European British subject claims his right under Section 35, and the other desires a separate trial, he may have it. But that is an express provision for that particular case. If the Legislature intended that that provision should have a more general application, it has not said so, and by making this particular provision has excluded

1876. its application to other cases, according to the rule *expressio*
 REG. *unius est exclusio alterius*. What is the scope of the direction
 v. in Section 33, that the nine persons shall be drawn by lot, or,
 LALUBHA'I in other words, whether the names of all jurors should be in
 GOPALDASS one box, or may be distributed into several boxes according to
 AND OTHERS. the communities to which the jurors belong, is a point on which
 we are not now required to give any opinion, and we give
 none, but we think that, if not inconsistent with the Act, the
 mode of selection from different boxes is the more convenient,
 as it insures the selection of a mixed jury consisting of persons
 of different creeds and nationalities. On the question referred
 to us we must refuse to disturb the conviction and sentence.

SARGENT, J. :—I am of the same opinion. Section 34 shows
 that the jury chosen under Section 33, however composed, may
 try any one whatever be his nationality. Section 35 is a par-
 ticular provision to meet an exceptional case. If the European
 British subject wishes to insure his being tried by a jury, of
 which the majority shall be Europeans or Americans or both, he
 may, under that section, claim the right to be so tried. If he
 does not claim that right he will be tried by a jury chosen under
 Section 33. Section 37 is also a particular provision to meet
 another special case, but the right thereby conferred on a person
 not being a European British subject, to be tried by a jury, the
 majority of which shall not be Europeans or Americans or both,
 only arises in the event of the European British subject, who is
 accused jointly with him, choosing to avail himself of the privilege
 conferred on him by Section 35. I, therefore, think the con-
 viction and sentence must stand.

GREEN, J., concurred.

[ORIGINAL CIVIL JURISDICTION.]

*Suit No. 658 of 1874.*DA'YA'L JAIRA'J (PLAINTIFF) v. JIVRA'J RATANSI AND ANOTHER
(DEFENDANTS).1875.
Sept. 28.*Equitable mortgage—Deposit of title deeds—Vendor and purchaser—
Notice—Fraud.*

Where the plaintiff had advanced to the 1st defendant Rs. 38,000, and had agreed to advance Rs. 27,000 more, the whole Rs. 65,000 to be secured by a mortgage of the 1st defendant's immoveable property, and the 1st defendant had deposited with the plaintiff the title deeds of his immoveable property, for the purpose of enabling him to get a mortgage deed prepared, and had agreed to execute such mortgage deed on payment to him by the plaintiff of the balance of the Rs. 65,000, and the title deeds were afterwards returned by the plaintiff to the 1st defendant for the purpose of enabling him to clear up certain doubts as to his title to some of the premises comprised in the deeds, and such deeds were not subsequently returned by the 1st defendant, nor were others deposited in lieu thereof, and the balance of the Rs. 65,000 was not paid by the plaintiff to the 1st defendant.

Held that there was an equitable mortgage to the plaintiff to secure Rs. 38,000 so far as concerned the property comprised in the deeds.

The reason for the rule of equity, that a purchaser of property, though for valuable consideration, and taking the legal estate, yet with notice of a prior incumbrance, purchases subject to such incumbrance, is that such purchaser is acting *malâ fide*, in taking away the right of the prior incumbrancer by getting the legal estate, while knowing that a prior purchaser has the right to it. But a purchaser for valuable consideration, without notice of the prior right of a third person, is not guilty of, or party to, a fraud upon the rights of a prior purchaser. The Courts of Equity, therefore, will not interfere with his right to the possession, enjoyment, and disposal of the property; and though, subsequently to his purchase, he may become aware of the prior incumbrance, yet he has the right to convey to a subsequent purchaser, who, at the time of such subsequent conveyance, has notice of the prior right of the third person; and such subsequent purchaser will take the property free from the incumbrance, for neither is he guilty of any fraud in accepting what his vendor had a right to convey, nor would the *bonâ fide* purchaser without notice be able, otherwise, freely and completely to dispose of the property which he innocently acquired. On the same principles, any subsequent purchaser, however remote, though having notice, must be protected.

Where, therefore, the 2nd defendant, having notice of the plaintiff's equitable mortgage, purchased from one, who, also with such notice, had purchased from a *bonâ fide* purchaser for value without notice,

Held that the 2nd defendant held the property free from the equitable mortgage.

Carter v. Carter (3 K. & Johns) distinguished.

1875.
 DÁYÁL
 JAIRÁJ
 v.
 JIVRÁJ
 RAJANI AND
 ANOTHER.

THIS was a suit, upon an equitable mortgage, by the mortgagee against the mortgagor and the purchaser of the mortgaged premises. The plaintiff sought to have it declared that he was entitled, as against the defendants, to a charge upon the house No. 9, in Kázi Sayad Street, as security for the sum of Rs. 38,000, together with interest thereon, advanced by the plaintiff to the 1st defendant in August 1865; for an account of what was due to the plaintiff on the security of the house; for a decree for payment by the defendants to the plaintiff of the amount found to be due to him; and, in default of such payment, for the sale of the house. The plaintiff alleged that, on 26th July 1865 and 31st July 1865, he advanced to the 1st defendant two several sums of Rs. 15,000, on an undertaking by the 1st defendant to give a mortgage security for the repayment of the same to the plaintiff; that on 10th August 1865 the 1st defendant delivered to the plaintiff a number of title deeds as the documents of title relating to the immoveable property of the 1st defendant, and agreed at the same time to give the plaintiff a writing in respect of his loans; and that on 11th August 1865 the plaintiff advanced a further sum of Rs. 8,000 to the 1st defendant, who at the same time executed to the plaintiff a document, the material parts of which were as follows:—"The sum of Rs. 38,000 has been received by me from Dáyál Jairáj on account of the sum of Rs. 65,000 agreed to be advanced at interest . . . on the mortgage of my four properties. [Here followed a description of the four properties, one of which was described as situate in Kázi Sayad Street and assessed under No. 9.] In consideration of my having received the said sum of Rs. 38,000, as above mentioned, I have deposited with the said Dáyál Jairáj all the title deeds that were with me in my possession, to enable him to get a proper mortgage deed prepared, and on payment of the balance of Rs. 27,000, less the costs, and a sum of Rs. 3,575, hereinafter mentioned, I hereby agree to execute the mortgage when prepared by Messrs. Acland, Prentis, & Bishop, Solicitors of the said Dáyál Jaináj, and to do all acts necessary for completing and making good the title to the aforesaid properties." The plaintiff further alleged that on or shortly after 11th August 1865 he deposited this agreement and the title deeds with his solicitors; that they advised him that there was a difficulty in identifying some of the properties men-

tioned in the agreement with those mentioned in the title deeds ; that shortly afterwards the plaintiff saw the 1st defendant on the subject, who promised to bring other papers ; and that thereupon the plaintiff landed back to the 1st defendant the title deeds which he had deposited with the plaintiff. The plaintiff never advanced to the 1st defendant the balance of Rs. 27,000, nor did the defendant return to the plaintiff the title deeds originally deposited with him, or deposit any others. The agreement of 11th August 1865, however, remained with the plaintiff's solicitors.

On 3rd September 1866 the 1st defendant mortgaged to the late Bank of Bombay (*inter alia*) the house No. 9 in Kázi Sayad Street, and deposited with these mortgagees the title deeds which he had previously deposited with the plaintiff; but the Bank had no notice, actual or constructive, of the alleged equitable mortgage to the plaintiff. On 15th February 1867, the Bank, in exercise of the power of sale contained in the mortgage of 3rd September 1866, put up the mortgaged premises for sale by public auction. Notice was, however, then given of the existence of the alleged equitable mortgage, and the sale was not proceeded with. On 24th April 1868 the Bank again exercised the power of sale in the mortgage of 3rd September 1866, and sold the house No. 9 in Kázi Sayad Street, to one Sundardás Mulji, who had notice of the existence of the alleged equitable mortgage to the plaintiff, and who on 20th February 1872 sold the house to the 2nd defendant, Gokuldás Mádhavji, who was alleged by the plaintiff's witnesses to have been present at the abortive auction sale in February 1867, and, therefore, also to have had notice of the existence of the equitable mortgage to the plaintiff.

The question, therefore, for the decision of the Court was whether the doctrine that a purchaser, with notice of a prior incumbrance, who, however, purchases from a purchaser without such notice, takes the property freed from such incumbrance, could be extended to such a case as the present, where a purchaser with notice purchased from another purchaser with notice, who had purchased from a purchaser without notice.

At the hearing before GREEN, J., the 1st defendant, Jivráj Ratansi, appeared in person, and stated he did not wish to defend the suit.

1875.
DARÁJ.
JATRAJ
v.
JIVRÁJ
RATANSI AND
ANOTHER.

1875
 DAVAJL
 JAIRA'S
 v.
 JIVRA'S
 RYTANI AND
 ANOTHER.

Scoble, Advocate-General, and *Lung* for the plaintiff :—The deeds were deposited with the plaintiff by the 1st defendant, to whom the plaintiff had already advanced Rs. 38,000. This would amount to an equitable mortgage even if the deeds had not been deposited expressly as security for the debts, but in this case there was an express agreement to mortgage: *ex parte Bruce* (1), *Edge v. Worthington* (2), *Hockley v. Bantock* (3), *Keys v. Williams* (4). Nor can it be said that this equitable lien of the plaintiff was ended by his being induced by the 1st defendant to return the title deeds to him for a particular purpose, which he never fulfilled; but, taking advantage of the plaintiff's complaisance, re-mortgaged the property to the Bank in fraud of the plaintiff. Moreover, the agreement of 11th August 1865 remained with the plaintiff. Even if the Bank of Bombay had no notice of the equitable mortgage to the plaintiff at the time of the mortgage to themselves on 3rd September 1866, yet both they and the 2nd defendant's vendor had notice before the sale to the 2nd defendant's vendor, and before the sale to the 2nd defendant he himself had notice. Not only, therefore, had the 2nd defendant notice, but his immediate vendor had also had notice of the prior incumbrance before he purchased: *Carter v. Carter* (5).

Latham and *Inverarity* for the 2nd defendant, Gokuldás Mádhavji :—In the first place the plaintiff is not an equitable mortgagee: *Norris v. Wilkinson* (6), *Ex parte Bulteel* (7) *Russell v. Russell* (8), *Ex parte Hooper* (9), *Ex parte Whitbread* (10). But, even if it be assumed that the plaintiff is an equitable mortgagee of the premises, and that the 2nd defendant had notice of that fact, yet, the 2nd defendant's vendor having purchased from a purchaser without notice of the prior incumbrance, the 2nd defendant takes free from the incumbrance: *Le Nere v. Le Nere* (11), and the cases discussed with it in *White & Tudor's Leading Cases in Equity*, show the principle which ought to be applied to this case. The Bank, being innocent purchasers, had a right to have, not only their possession, but their power of disposal of the property

- (1) 1 Rose, 374. (2) 1 Cox Eq. Ca. 211. (3) 1 Russ. 141.
 (4) 3 Y. & Col. 55. (5) 3 Kay & Johns. 617. (6) 12 Ves 192.
 (7) 2 Cox Eq. Ca. 243. (8) 1 Bro. C. C. 269. (9) 1 Mer. 9. (10) 1 Rose 299.
 (11) 2 Wh. & Tud. L. C. 28; S. C. 3 Atk. 646; 1 Ves 64; 1 Amb. 436.

protected. That is the principle on which the purchaser from them, though with notice of the prior incumbrance, takes the property free from such incumbrance, and on the same principle ought any number of subsequent purchasers, though with notice, each to take the property free from the incumbrance:

Kerr on Fraud, p. 253.

GREEN, J., after reviewing the facts above stated and the effect of the agreement of 11th August 1865, proceeded:—Though the right of the plaintiff to call upon Jivrāj Ratansi to execute a legal mortgage of the property, described or referred to in the agreement of 11th August 1865, depended on the plaintiff making a further advance of Rs. 27,000, to complete the Rs. 65,000 agreed to be advanced, yet the deposit of the title deeds, though coupled with the expression in the agreement of the purpose of such deposit, as being to enable the plaintiff to get a proper mortgage deed prepared, would, having regard to the fact that Rs. 38,000 had been already advanced on account of the Rs. 65,000, amount in law to an equitable mortgage to secure the Rs. 38,000, so far as concerned the property comprised in the deeds deposited or any of them: *Keys v. Williams* (1), *Hockley v. Bantock* (2).

Upon, or shortly after, 11th August 1865 the plaintiff delivered the agreement and the title deeds so deposited with him by Jivrāj Ratansi to his (the plaintiff's) solicitors. He appears to have been advised by them that the title deeds were not in order,—in this respect particularly, that there was difficulty in identifying the properties mentioned in the agreement of 11th August 1865, or at least some of them, with the properties mentioned in the title deeds, and it was arranged that the deeds should be handed back to Jivrāj with the view of clearing that difficulty. The plaintiff states that thereupon—the exact date, however, is not fixed—he told Jivrāj Ratansi that he had been advised that the papers were not proper, or in order. He states that he said to Jivrāj Ratansi, “You should, therefore, bring other papers. He said he would bring other papers. After this conversation, the same or the following day, the deeds were given back to Jivrāj's partner, Amarji Hemji. Amarji was told the papers were not complete, or

1875.
D.V. & L.
JIVRAJ
RATANSI
AND
ANOTHER.

(1) 3 Y. & Col 55.

(2) 1 Russ. 141.

1875.
 DAVAL
 JAIRAJ
 v.
 JIVRAJ
 RATANSI AND
 ANOTHER.

proper; that he should bring others, complete, or proper; and that thereafter a further sum of money should be paid." Amuji Hemji states that he received back the title deeds 10 or 15 days after the execution of the writing, *i.e.*, after 11th August 1865. All that this witness recollects as having been said to him on the occasion of giving back the deeds is, "The papers are not proper. Do you give them over to your master (*i.e.*, Jivraj Ratansi). I was not told in what respect the papers were not proper." So the matter remained. No steps appear to have been taken by the plaintiff to cause Jivraj Ratansi to clear up the difficulties considered to exist, or to furnish further and better title, and the balance of the Rs. 65,000, *viz.*, Rs. 27,000, was never advanced. The deeds so returned remained with Jivraj Ratansi, and the agreement of 11th August 1865 with the plaintiff's solicitors. The inaction of the plaintiff is, I think, reasonably explained by the circumstance that, during the latter part of August and the month of September 1865, his attention was taken up with a serious criminal charge which had been brought against him, and on which he was committed for trial to this Court, and on 30th September 1865 he was convicted and sentenced to transportation. The assertion of a still existing right to an equitable mortgage, over the property to which the agreement of 11th August 1865, and the title deeds deposited but returned, as agreed, purported to relate, seems to have been first made about November 1866, and then by the Government Solicitor, who, on behalf of Government, was engaged in procuring the execution of that part of the sentence, passed on the plaintiff, which ordered that the rents and profits of his moveable and immoveable property should be forfeited to Government during the period of transportation. In fact, Valu Jairaj, the brother of the plaintiff, who, after the plaintiff was removed in February 1866 to the Andamans, acted as his attorney, does not seem to have been aware of the existence of the agreement of 11th August 1865, or of the deposit and return of the title deeds, till about October or November 1866, though he had become aware from the plaintiff's account books of the advances to Jivraj Ratansi of the sums of Rs. 15,000, Rs. 15,000, and Rs. 8,000. The plaintiff states that he was able and willing at any time to have made the further advance of Rs. 27,000, making up the sum of Rs. 65,000; but that previous to his conviction and confinement

on 30th September 1865, Jivrāj Ratansi never applied for the same.

On 3rd September 1866 Jivrāj Ratansi conveyed to the late Bank of Bombay (amongst other things) the premises against which the alleged equitable mortgage of the plaintiff is, by this suit, sought to be enforced, by way of mortgage, to secure the sum of Rs. 26,355 then due and owing by the said Jivrāj Ratansi to the said Bank, with interest at 10 per cent per annum, and the plaintiff states that he deposited with the Bank the title deeds of the said premises. It is not alleged in the plaint, nor is there a particle of evidence to show, that the Bank of Bombay, when they took the mortgage of 3rd September 1866, had notice, actual or constructive, of the alleged equitable mortgage of the plaintiff; and it will have been observed that the plaint itself states that on that occasion the title deeds were delivered to them by Jivrāj Ratansi.

In the month of February 1867 the Bank caused the premises so mortgaged to them to be put up for sale by public auction, under the power in that behalf contained in their mortgage deed. At the auction, which was held on 15th February 1867, a notice was read aloud, and explained to those assembled at the sale, on behalf of the Government Solicitor, to the effect that the properties in Kāzi Sayad Street, Nos. 8 and 9, then put up for sale, were subject to a lien, under the said agreement of 11th August 1865, and then vested in the Secretary of State, for the sum of Rs. 38,000 advanced by the plaintiff to Jivrāj Ratansi, and interest. It is stated in evidence that one Sundardās Mulji and the defendant Gokuldās Mādhavji were (amongst others) present at the said auction. As to Sundardās Mulji, there is no contradiction of the statement that he was present. The presence of Gokuldās Mādhavji, however, at this auction, which is deposed to by Vallu Jairāj, the brother of the plaintiff, and by Keshavji Jādhavji (who, though subpoenaed on behalf of the defendant Gokuldās Mādhavji, and who is a maternal uncle of the plaintiff, was not called by either of the parties, but was called and examined by myself) was denied by the defendant Gokuldās Mādhavji. Though I should be disposed to believe, in the circumstances of the case, had it been necessary to decide the point, that the defendant

1875.

DA'YAD
JAIRAJ
" "
JIVRAJ
RATANSI AND
ANOTHER.

1875. Gokuldás Mádhavji *was* present at this sale, yet, for reasons which will hereinafter appear, it is not necessary to express any decided opinion on this matter. The sale, owing probably to the reading of the said notice, was not proceeded with.

DA'YAT
JATRA'J
v.
JIVRA'J
RAFANSI AND
ANOTHER.

On 24th April 1868 the Bank of Bombay, in exercise of their power of sale, conveyed the property in question in this suit to Sundardás Mulji in consideration of Rs. 4,000, and in this conveyance the trustees, under Act XXVIII. of 1865, of Jivrāj Ratansi & Co., joined. Now, whether or not Sundardás Mulji was present at the abortive auction of 15th February 1867, and heard the notice read, the evidence shows clearly that, before he completed his purchase, he had notice that Government, on behalf of the plaintiff, and as being interested in the rents and profits of his estate, claimed to have a lien, or charge, on the property, to secure the Rs. 38,000 advanced by the plaintiff to Jivrāj Ratansi.

On 20th February 1872 Sundardás Mulji, in consideration of Rs. 7,000, conveyed the premises in Kāzi Sayad Street, the subject of this suit, to the defendant Gokuldás Mádhavji.

The case of the plaintiff, therefore, stands thus : He is entitled to an equitable mortgage on the house No. 9, in Kāzi Sayad Street, the legal and apparent owner of such house being, at the time of the making of such equitable mortgage, the defendant Jivrāj Ratansi. Jivrāj Ratansi fraudulently avails himself of the fact of having received back the title deeds, for the purpose of clearing up the supposed difficulties in his title, to mortgage the property to the Bank of Bombay, by a legal conveyance. The Bank of Bombay have no notice, at or before the time their mortgage was executed, of the fraudulent conduct of Jivrāj Ratansi, or of the claim of the plaintiff or the Government to have a charge in equity on the property, and they receive from Jivrāj Ratansi the title deeds of the property. The Bank, in April 1868, sell and convey the property, for a valuable consideration, to Sundardás Mulji, who, however, had notice of the plaintiff's claim, and Sundardás Mulji, in February 1872, sells and conveys the property for a valuable consideration to the defendant Gokuldás Mádhavji, who also, according to the plaintiff's case, had notice of the plaintiff's claim, by reason of his (the said defendant's) presence at the

auction of February 1867. There is no other fact in evidence, except this alleged presence of Gokuldás at the auction, which goes to prove that, when he purchased from Sundardás in February 1872, he had notice of the plaintiff's claim. If, then, as he states himself, he was not present, the case of the plaintiff falls at once to the ground, as he would in that case be entitled to rely on the position of being himself a purchaser for valuable consideration without notice. I am of opinion, however, that, even assuming the other alternative, which the plaintiff contends for, viz., that Gokuldás was present, to be true, the case of the plaintiff must fail, and for the following reasons:—

1875
DA'IA'L
JAIRA'S
B.
JIVRA'
RAJANSI AND
ANOTHER.

The ground of the rule of equity, that a purchaser of property, though for valuable consideration, and taking the legal estate, yet with notice of the prior right of a third person, purchases subject only to the right of which he so had notice, is placed by Lord Hardwicke in the leading case of *Le Neve v. Le Neve* (1) on this, that the taking of a legal estate, after notice of a prior right makes a person a *mala fide* purchaser; that there is a kind of fraud on his part in this, that, knowing that a prior purchaser has the clear right to the estate, he takes away his right by getting the legal estate. The Lord Chancellor states further that fraud or *mala fides* is the true ground on which the Court is governed in cases of notice.

The earlier cases on the subject were chiefly cases where one conveyed the legal estate in landed property to another, by way of sale, mortgage, or settlement in consideration of marriage, but which property he had previously conveyed or charged, in favour of a third person, by a mode which, for want of a formal deed, or other defect, did not pass the legal estate. There the second purchaser, mortgagee, or object of the settlement, though taking the legal estate, which had not previously passed from the vendor or settlor, and though giving a valuable consideration, yet was held to take the legal estate, only subject to any right of such third person of which he had notice at the time of paying the consideration or taking the conveyance. The act of the vendor or settlor, in conveying or charging property he had already conveyed or

(1) 1 Amb. 437; S. C. 3 Atk. 646; 1 Ves. 64, 2 Wh. & Tind. L. C. 23.

1875.
 D'YEA/L
 JAIRA/J
 n.
 JIVRA/J
 RATANSI AND
 ANOTHER.

charged in favour of a third person, was held to involve a fraud on the right of that third person; and one who accepted a conveyance or charge from the vendor or settlor with notice of such prior right, though taking the legal estate, and giving valuable consideration, yet, by reason of the notice he had had of such prior right, was treated as an accomplice in the fraudulent conduct of the vendor or settlor, and as holding his estate subject only to the right of which he has had notice. But where a person for valuable consideration accepted a conveyance or charge, without any notice of the right of a third person, which rendered the act of the vendor or settlor in conveying or charging the property a fraud in contemplation of law, then, though the vendor or settlor may be guilty of a fraud, the purchaser is not his accomplice, and Courts of Equity have seen no ground for interfering with the position of advantage which his holding of the legal estate confers upon him, namely, the right to the possession, enjoyment, and disposal of the property. I say disposal, as it would be a very insufficient protection of such a purchaser's right to say he may hold the property undisturbed, but may not dispose of it to the best advantage. In other words, such a purchaser's conveyance to another of the legal estate, with its attendant advantages, is no more a fraud on the right of the third person, of which right he had no notice when the property was conveyed to him, and that, too, though he may have received notice of such right after his acquisition of the property, than was the acquisition itself by him of the property. And it is well settled that such a purchaser has the right to convey to one who, at the time of the property being conveyed to him, has notice of the right of the third person. In other words, though having notice, he protects himself by reason of taking from one who had no notice, and this by the necessity of protecting the right of free disposal by the latter. It may be considered that, though having notice, such a purchaser does nothing fraudulent in accepting what his vendor had a right to convey. The ground, however, generally given for the principle that a purchaser with notice is entitled to protect himself under a conveyance from one who had no notice, is the very practical one already referred to; that to hold otherwise would be, possibly, seriously to impede, or even wholly to prevent, the *bonâ fide* purchaser without notice from disposing of his property at all. Though, so

far as appears, the precise question arising here, whether a purchaser with notice from one who also had notice, but had purchased from one who had no notice, is to be protected, as was his immediate vendor, by the right of the first vendor, has not arisen, yet I am of opinion, on a consideration of the authorities (many of which are cited in the notes to the case of *Le Neve v. Le Neve* (1), that the ground on which a purchaser with notice is allowed to protect himself by reason of having purchased from one who had none, viz., the securing to the purchaser without notice the full benefit of what he had innocently acquired, must be held to protect a subsequent purchaser, however remote, though having notice. I think the proposition in Kerr on Fraud, p. 253, though not, of course, in itself an authority, is supported by the principles on which the cases on this branch of the rules as to notice are based, the proposition, namely, "The *bonâ fide* purchaser of an estate for valuable consideration purges away the equity from the estate in the hands of all persons who may derive title under it, with the exception of the original party whose conscience stands bound by the meditated fraud. If the estate becomes re-vested in him, the original equity will attach to it in his hands." The case of *Carter v. Carter* (2), which in *Bates v. Johnson* (3) is further observed upon and adhered to by the learned Judge who decided it, though not considered satisfactory by at least one of the Judges of appeal who decided the case of *Pilcher v. Rawlins* (4), was a peculiar one. It was not concerned with the question what protection is to be given to an assignee, proximate or subsequent, from a purchaser without notice: and, even if it cannot be said that the authority of the decision has been disclaimed by the Court of appeal, it is one of so peculiar a character, that it cannot, in my opinion, govern the present case, which appears to be governed by well-settled rules and principles.

Without, therefore, expressing any opinion on several other points raised in defence, I am of opinion that, assuming that the defendant Gokuldás Mádhavji had, at the time of his purchase,

(1) 2 Wh. & Tad. 28. (2) 3 K. & Johns. 617. (3) Johns. 316. *

(4) L. R. 7 Ch. Ap. 259.

1875.
DACA
JAN 27
JIVRA
RAJESHA
ANOLLI

1875. notice of the plaintiff's equitable mortgage, yet that, deriving title under the Bank of Bombay, who were purchasers for value without notice, he holds the property in question free from the alleged right of the plaintiff as equitable mortgagee under the deposit of title deeds of August 1865. The decree is that the plaintiff's suit be dismissed with costs.

DA'YA'L
JATRA'J
v.
JIVRA'J
RAFANSI AND
ANOTHER.

[APPELLATE CIVIL JURISDICTION.]

Special Appeal No. 184 of 1875.

June 19. KALOVA KOM BHUJANGRA'V (DEFENDANT NO. 1, APPELLANT) v.
PADA'PA' VALAD BHUJANGRA'V (PLAINTIFF, RESPONDENT)

Limitation—Act XIV. of 1859, Section 1, Clause 16—Act IX of 1871, Schedule II, Article 129—Declaratory decree—Suit to set aside adoption—Court Fees' Act No VII. of 1870, Schedule II., Article 17, Clause 5—Act VIII. of 1859, Section 15—Consequential relief.

B died, leaving him surviving two widows, K and R. Some time after B's death, P, a son, was born to R on the 15th September 1848. Some time before P's birth, a portion of B's *watan* lands had been made over to K by the Revenue authorities. The remaining portion of B's *watan* lands was placed by Government under sequestration, which was not removed until 1865. Shortly after P's birth, R petitioned the Revenue authorities, claiming the *watan* lands of B for P as B's son. On the 15th February 1849, the Revenue authorities on enquiry held that P was not the son of B, and decided that K was entitled to retain the *watan* lands of B. On the 16th March 1872, K adopted a son BA. In a suit brought by P on the 4th December 1872 for a declaration that he (P) was the son of B, and for setting aside the adoption of BA by K, BA and K contended that the claim was barred by limitation under Act XIV. of 1859.

Held in special appeal that, the suit not being one to recover property but to set aside the adoption, was within time under that Act.

Held also that under the circumstances a suit for a declaratory decree would lie; for the plaintiff, even if his claim to the property were barred as against K, would yet be entitled to obtain an injunction against any intervention of BA in performing the *shradh* or other ceremonies for the benefit of B, or assuming the *status* of B's adopted son, and, moreover, the Legislature has in Act VII. of 1870 and Act IX. of 1871 recognized the right of a person to bring a suit to set aside an adoption as a substantive proceeding, independent of any claim to property.

THIS was a special appeal from the decision of S. Tagore, Acting Senior Assistant Judge at Kaladgi, in the district of Belgaum, reversing the decree of Mahadev Krishna, 2nd Class Subordinate Judge at Bagalkot.

The facts of the case are these :—One Bhujangráv Desái died, leaving him surviving two widows, Kalová and Rámová. On the 15th September 1847 the plaintiff Padápá was born to Rámová. Before his birth, however, the Revenue Authorities made over a portion of Bhujangráv's *watan* lands to Kalová as the elder widow of Bhujangráv, and placed the remaining *watan* under sequestration, which continued until 1865. On the birth of Padápá the younger widow Rámová petitioned the Revenue Authorities, and claimed the *watan* lands for Padápá as Bhujangráv's son. On the 15th February 1849, Rámová's petition was rejected by the Revenue Authorities, on the ground that Padápá's parentage could not be traced to Bhujangráv, as he was born long after the natural period of gestation, calculated from the date of Bhujangráv's death. They also decided that Kalová should be allowed to retain possession of the *watan*. On the 16th March 1872, Kalová adopted Bálapá bin Appá Sáheb, defendant No. 2, as a son to her deceased husband Bhujangráv. On the 4th December 1872, the plaintiff Padápá brought the present suit, and prayed that he might be declared the son of the deceased Bhujangráv, and the adoption of Bálapá by Kalová be set aside. The plaint stated the cause of action to have arisen on the 16th March 1872, the date of Bálapá's adoption. Kalová and Bálapá pleaded limitation, and contended that under Act XIV. of 1859 the suit was barred. They also contended that the plaintiff was not the son of Bhujangráv, as they alleged that he was born more than a year after Bhujangráv's death, and that the Revenue Authorities after proper enquiry decided, on the 15th February 1849, that Kalová was entitled to the possession of the *watan* lands. The Subordinate Judge at Bágalkot held that the cause of action in the suit accrued on the 15th September 1848, the date of the plaintiff's birth, and that as the suit was not filed within three years after the plaintiff had attained his majority, the claim was barred under Act XIV. of 1859, Section 1, Clause 16, and Section 11. The only question raised in appeal was that of limitation, and the Assistant Judge held that the suit was not barred, and that, as the plaintiff simply sought for a declaration of his title as the son of Bhujangráv, and for the setting aside of Bálapá's adoption made in violation of that title, the cause of action accrued to him (plaintiff) on the 16th March 1872, the date of Bálapá's adoption, as

1876.
 KALOVÁ' KOM
 BHUJANGRA'V
 v.
 PAD'PA'
 VALAD
 BHUJANGRA'V.

1876. rightly stated by the plaintiff in his plaint. He also held that the decision of the Revenue Authorities, made on the 15th February 1849, was no bar to the present suit, as it was not an action to recover possession of Bhujangráv's *watan* lands.

KALOVÁ' KON
BHUJANGRA'V
v.
PADA'PA'
VALAD
BHUJANGRA'V.

The special appeal from this decision was argued before WESTROPP, C. J., and NÁNÁBHÁI HARIDÁS, J.

Gokuldás for *Dhirájlál Mathurádas*, Government Pleader, for the special appellant :—The plaintiff, in the present suit, seeks to have himself declared the son of Bhujangráv, and to set aside the adoption of Bálapá by Kalová. His cause of action, therefore, arose on the 15th February 1849, when the plaintiff was held, by the Revenue Authorities, not to be Bhujangráv's son, and the estate was handed over to Kalová. The suit is also not maintainable on another ground, that the plaintiff can by it obtain no consequential relief, such as a right to Bhujangráv's property, because it has been in the adverse possession of Kalová for more than twelve years. As ruled by the Privy Council in *Rajah Nil-money Sing Deo Bahadoor v. Kally Churn Bhattacharjee* (1) the right of obtaining a declaration of title without consequential relief under Section 15 of Act VIII. of 1859 can be claimed in those cases only in which the Court could have granted relief, if such relief had been prayed for. In another case the Privy Council held that a declaratory decree could not be made, unless there was a right to consequential relief capable of being had in the same Court or in some other Court: *Strimathoo Moothoo Vijia Ragoonada Rancee Kolandapuree Natchiar v. Dorasinga Tever* (2).

Pándurang Balibhadra for the special respondent :—The cause of action for setting aside Bálapá's adoption accrued to the plaintiff on the 16th March 1872, when Bálapá was adopted by Kalová, and the suit falls under Act XIV. of 1859, Section 1, Clause 16, as held in *Mrinmoyee Dabea v. Bhoobunmoyee Dabea* (3). Moreover, Act VII. of 1870, Schedule II., Article 17, Clause V. (The Court Fees' Act), has fixed a special stamp fee for a suit for setting aside an adoption, and the new Limitation Act No. IX. of 1871, Article 129, provides a period within which such a suit is to be

(1) 23 Calc. W. R. Civ. Rul. 150; S. C. L. R. 2 Ind. Ap. 83; 14 Beng. L. R. 382.

(2) 23 Calc. W. R. Civ. Rul. 314; S. C. L. R. 2 Ind. Ap. 169; 15 Beng. L. R. 83.

(3) 15 Beng. L. R. 1; S. C. 23 Calc. W. R. 42 Civ. Rul.

brought. It will appear from these provisions that the Legislature has recognized the existence of the right to bring such a suit, apart from any right to property.

The judgment of the Court was delivered by

WESTROPP, C. J.:—Independently of any claim which the plaintiff may now have, or may, by lapse of time, have lost, to the property of the deceased Bhujangráv, we think that he is within time to maintain against Bálapá this suit to set aside his adoption, which took place in 1872, the year in which this suit was instituted; Clause 16 of Section 1 of Act XIV of 1859 being the enactment applicable to such a case previously to the coming into force of Act IX. of 1871, Schedule II., Article 129, as decided by the High Court of Calcutta in *Mrimoyee Dabee v. Bhoobunmoyee Dabee* (1). It has been argued that, inasmuch as the fact, that the plaintiff is the son of Bhujangráv, was, with regard to immoveable property, disputed in the Christian year 1849 before the Collector, this suit must be regarded as barred by lapse of time; but this is not a suit to recover the immoveable property, and we do not intend to decide in it whether or not the plaintiff is barred from recovering that property. Possibly he may be so, as to a part or as to the whole, but we do not say whether he is so or not. The nature of the possession since Bhujangráv's decease should be considered whenever that question may be properly raised. It may be that the two widows of Bhujangráv have been in joint possession. It may be that the plaintiff has been maintained out of the rents and profits of the property. It may be that until 1851 neither widow was from the death of Bhujangráv in possession of the sequestered property, or that both widows were originally so, and were deprived of possession on the sequestration, and were restored to joint possession upon its removal. Whether or not there was, or could have been, any exclusively adverse possession by the widow Kalová under the foregoing circumstances, so as to set time running against the plaintiff, will be a question to be determined when the proper occasion may arise. Independently of any claim to the property of Bhujangráv, we think that a suit to set aside the adoption of Bálapá would lie for the plaintiff, if he be the son

1876.
KALOVÁ' KUM
BHUJANGRÁV
v.
PADA'PA'
VATAD
BHUJANGRÁV.

(1) 15 Beng. L. R. 1; S. C. 23 Calc. W. R. 42 Civ. Rul.

1876. of Bhujangráv, inasmuch as, if the claim of the plaintiff to the property were, as against Kalová, barred by lapse of time, and the plaintiff bring, as he has done, his suit to set aside the adoption within time against Bálapá, the plaintiff would be entitled to obtain an injunction against any intervention of Bálapá in performing the *shráddh* or other ceremonies for the benefit of Bhujangráv, or assuming the *status* of adopted son of Bhujangráv. The Legislature seems distinctly to have recognized the right of a person to bring a suit to set aside an adoption as a substantive proceeding, independent of any claim to property, and to have fixed a special court fee for such a suit (Act VII. of 1870, Schedule II., Article 17. Clause V); and in the new Limitation Act (IX. of 1871), Article 129, the right to bring such a suit has since been again distinctly recognized. For all of these reasons we think that the objections founded by Mr. Gokuldás, on behalf of his client Kalová, on Section 15 of Act VIII. of 1859, and the decisions of the Courts thereon, as to declaratory suits and the possibility of consequential relief, cannot be permitted to prevail here. We, therefore, affirm the decree of the Assistant Judge. Upon the retrial of the case the retrying Court should determine the question whether the plaintiff is the son of Bhujangráv. Should that question be determined in favour of the plaintiff, the retrying Court should proceed to consider and determine the validity of the adoption of Bálapá, as to which question it may be desirable to refer that Court to the decisions of this Court in *Bashetiappa v. Shivlingappa* (1), *The Collector of Surat v. Dhir-singji* (2), and *Balvantrav Bháshur v. Bayabái* (3); and of the Madras Court in *Subbáluvammál v. Ammátutli Ammál* (4). The costs of the regular and special appeals in this suit must be costs in the cause, and must depend on the final result of the retrial.

(1) 10 Bom. II C Rep 268.

(2) *Ib.* 235.

(3) 6 Bom. II. C. Rep 83 O C. J.

(4) 2 Mad. II. C. Rep. 129.

[ORIGINAL CIVIL JURISDICTION.]

*Suit No. 109 of 1873.*ABBA' HA'JI ISHMA'IL (PLAINTIFF) v. ABBA' THARA (DEFENDANT).
JUDGE, APPLICANT.1876,
July 15*Limitation—Act IX. of 1871, Schedule II, Clause 85—"Suit"—Rule 149
of the Common Law Rules of the late Supreme Court—Attorney and
Client—Bill of Costs.*

An application (under Rule 149 of the Common Law Rules of the Supreme Court of Bombay) by an attorney, that his client should show cause why he should not pay the balance shown by the Taxing Master's *allocatur* to be due in respect of his bill of costs, and why, in default of such payment, attachment should not issue against the person and property of the client, is not "a suit" within the meaning of the Limitation Act IX. of 1871.

Such an application as the above is not barred by any law of limitation now in force in British India.

THE applicant in this case obtained in chambers a summons, under Rule 149 of the Common Law Rules of the late Supreme Court, against the defendant, calling on him to show cause why he should not pay the balance due upon an *allocatur* of the Taxing Master, and why, in default of such payment, attachment should not issue against the person and property of the defendant.

Cause was shown before BAYLEY, J., in chambers on 22nd June 1876, when the defendant's attorney contended that the claim was barred by Clause 85 of Schedule II. of the Limitation Act (IX. of 1871).

The learned Judge intimated a wish to hear the point argued by counsel, and accordingly this was done on 7th and 15th of July 1876.

Purcell, for the defendant, showed cause:—The claim is barred by Clause 85 of Schedule II. of Act IX. of 1871. The present application is a proceeding in the nature of a suit. Clause 85 of Schedule II. of Act IX. of 1871 shows that it was the intention of the Legislature to fix a limit within which an attorney could recover the amount of his bill of costs; but if Clause 85 does not apply in the present case, there is absolutely no limit to the time within which such an application as this can be made.

Marriott, Advocate General (Acting), for the applicant, in support of the summons:—The present application is not a suit

1876.
 ABBA' HA'JI
 ISHMA'IL
 v.
 ABBA' THARA.

within the meaning of the Limitation Act. It is made under a form of procedure prescribed by Rule 149 of the Common Law Rules of the late Supreme Court, which has never been abolished, but has been adopted as a part of the procedure of the present High Court. Such an application can be made at any time, as there is no law of limitation now in force applicable to it.

[He was stopped by the learned Judge.]

BAYLEY, J., after stating the summons and the cause shown, continued:—The point made by the applicant's counsel is a novel one, viz., whether the Indian law of limitation now in force applies in its three years' limit to an application made under Rule 149 of the Common Law Rules of the late Supreme Court. This rule is found amongst the first rules of the Supreme Court framed in 1825, and is in these words:—"In all cases whatsoever where costs for business done by solicitors, attorneys, or proctors, shall be due from a client, the solicitor, attorney, or proctor shall be at liberty to tax his bill of costs before the master, first duly serving a copy of the warrant to tax upon the client, and, on affidavit being made of the due service of the master's allocatur, a Judge's summons shall be issued that such client may show cause why he should discharge the same; and in case no good and sufficient cause shall be shown on the return of such summons, then, upon affidavit of the due service of the summons, an attachment shall forthwith issue against the party in contempt, which shall not be discharged but on payment of the amount of such allocatur, and of the costs of such contempt. But nothing in this rule contained shall prevent any attorney from bringing an action for his bill of costs, if he think fit" (1).

Then there is the 151st of the same rules (2), which obliges an attorney to get his bill of costs taxed before receiving the amount, in these words:—"The attorneys, solicitors and proctors shall not in any instance receive or demand the amount of any bill, or part thereof, except reasonable advances to be accounted for before the master, till the same shall have been taxed by the master, who shall after taxation register the same in books, to be kept by him for that purpose in his office, and shall be allowed to charge for the registering of such bills half a rupee per folio."

(1) Rules and Orders of the Supreme Court of Judicature at Bombay, p. 29.

(2) *Idem* p. 130.

It is to be noticed that this summary application under Rule 149 is one which did not exist in England at the time when that rule was made here. The concluding words of the rule, that "nothing in it contained shall prevent any attorney from bringing an action for his bill of costs, if he think fit" were doubtless introduced to show that it was not intended to prevent any solicitor suing on his bill. According to the Attorneys' Act then in force in England (2 George II., Cap. 23, Sec. 23,) no attorney could commence an action to recover the amount of his bill of costs till the expiration of one month after the delivery of the bill to his client, and upon application by the client the Judges were required to refer the bill to the proper officer for taxation. Upon taxation the client had to pay forthwith the amount of the taxed bill, and in default was liable to an attachment or process of contempt, or to such other proceedings at the election of the attorney as the client was before liable to.

1876
 ALBA' HAN
 ISMA'IL
 " "
 ABBA' THARA.

Rule 149, therefore, introduce a novel practice here, and it has never been questioned down to the present time.

On the abolition of the Supreme Court its rules were continued so far as was practicable, first by Rule I. of Chapter II. of the High Court Rules, (1) and afterwards by the general rule, passed in substitution of the one last named on 1st August 1871, which is in these words—: "All rules which at the time of the abolition of the Supreme Court of Judicature at Bombay were in force for regulating the practice of the Court at its Plea and Equity sides, shall extend, so far as the same are applicable, and as nearly as may be to all matters of Ordinary Original Civil Jurisdiction in this Court, except in such respects as the same may be contrary to the Statutes 24 and 25 Vict., Chap. 104, or to the Letters Patent continuing this Court, bearing date the 28th day of December in the 29th year of the reign of Her Majesty (A.D. 1865), or to the rules of this Court made, or which shall hereafter be made, under and in conformity with the 37th Section of the said Letters Patent, or to the provisions of Act VIII. of 1859, and of any subsequent law which has been made amending or altering the same by competent legislative authority for India, save so far as the said provisions of the said Act VIII. of 1859, and subsequent laws

(1) Rules of the High Court, p. 38.

1876. as aforesaid, have been or hereafter shall be, as regards this Court, duly modified by its rules which have been or hereafter shall be made as aforesaid, under and in conformity with the 37th Section of the said Letters Patent. And the practice of this Court, in all matters of Ordinary Original Civil Jurisdiction aforesaid, shall be likewise regulated by the provisions, so far as the same are applicable, of the said Act VIII. of 1859, and of any subsequent law which has been made, amending or altering the same by competent legislative authority for India, except so far as such provisions have been or shall hereafter be modified by this Court under and in conformity with the said 37th Section of the said Letters Patent granted by Her said Majesty in pursuance of the said Statutes 24 and 25 Victoria, Chapter 101, and the Statutes 28 and 29 Victoria, Chapter 15. Nothing hereinbefore contained shall affect Chapter XVIII. of the Rules of this Court made on the 25th day of November 1867, regulating proceedings in its Admiralty and Vice-Admiralty Jurisdiction, or the procedure of this Court in its Testamentary and Intestate Jurisdiction, which, as heretofore, shall continue to be the same as that of the said Supreme Court in its like jurisdiction at the time of its abolition." It follows, therefore, that Rule 149 of the Common Law Rules of the late Supreme Court is still in force. That the Supreme Court had the power to frame such a rule for the regulation of its own procedure, appears from the case of *Her Highness Ruckmaboye v. Lulloobhoy Mottichund* (1), an appeal from the Supreme Court of Bombay, where that power is discussed. No doubt the 149th Common Law Rule was framed by the Supreme Court, because it felt that it was desirable to give solicitors every facility for recovering their costs.

The case which I have just cited, shows that the law of limitation then (in 1852) in force in the towns of Calcutta, Madras, and Bombay was the English Statute 21 Jac. I., Cap. 16, and that statute continued to be in force here till it was repealed, as I shall presently mention. The Statute 21 Jac. I., Cap. 16, is intitled "An Act for limitation of *actions*, and for avoiding *suits* in law," and the words used in Section 3 are "that all *actions* of account," "all *actions* of debt," &c., are to be brought within six years next after the cause of such *actions*. It would be a ques-

(1) 5 Moore Ind. Ap. 234. See pp. 262 *at seqq.*

tion, then, whether the term *action* used in that section could be held to apply to such an application as the present.

The statute of James I. remained in force in the three towns above mentioned till the passing of Act XIV. of 1859 (1). That is intituled "An Act to provide for the limitation of *suits*," and the preamble recites that "it is expedient to amend and consolidate the laws relating to the limitation of *suits*."

In *Kristo Kinkur Roy v. Rajah Burrodacant Roy* (2) the questions raised for the decision of the Privy Council are thus stated in the judgment by Sir James Colvile :—"1st, is the execution of a decree of the High Court made on appeal from one of the Courts in the Mufussil to be governed by the 20th or by the 19th Section of Act XIV. of 1859? 2ndly, what is the effect of a decree of the High Court? And, 3rdly, had there been in that case anything done within three years of the date of the application for execution sufficient to keep the decree to be executed in force within the meaning of the 20th Section of Act XIV. of 1859?" At p. 486 of the report the judgment continues thus :—"The powers and jurisdiction of the Supreme Court, with some slight modification of the latter, were transferred to the High Court, to be exercised by it as a Court of original jurisdiction; and the powers and jurisdiction of the Appellate Mofussil Courts were transferred to it to be exercised by it as an Appellate Court. But the law to be administered by it as a Court of original jurisdiction was substantially that previously administered by the Supreme Court; whilst that to be administered by it on appeal from the Mofussil Courts was necessarily that of those Courts. The Code of Procedure (Act VIII. of 1859) was, indeed, made the procedure of the Court in its original as well as in its appellate jurisdiction, and superseded the procedure which had previously obtained in that Supreme Court. But that Code did not touch the subject of limitation, which continued to be regulated by Act XIV. of 1859."

Now, I do not find anything in Act XIV. of 1859 which embraces an application, such as this, under Rule 149 of the Common Law Rules of the Supreme Court. Clause 16 of Section 1 of that Act provides a period of six years for all *suits* for which no other limitation is expressly provided elsewhere in the Act.

(1) See Reg. V. of 1827; Act XIV. of 1840; and Act XXVI. of 1841.

(2) 14 Moore Ind. Ap. 465; S.C. 10 Beng. L. R. 101; 17 Calc. W. R. 292 Civ. Rul.

1876.
ALBA' HAJI
ISHMA'IL
ALBA' THARA.

1876
 ABBA' HA'JI
 ISHM'IL
 v.
 ABBA' THARA.

Then we come to Act IX. of 1871, which is intituled "An Act for the limitation of *suits and for other purposes*," and the preamble of which recites that "it is expedient to consolidate and amend the law relating to the limitation of *suits, appeals, and certain applications to Courts*." These words are more comprehensive than those used in Act XIV. of 1859, which, no doubt, is to be accounted for by the fact that, when Act IX. 1871 was passed, the Civil Procedure Code was in force, and the High Courts had been established. We should, therefore, naturally expect to find greater reference to the phraseology of the Civil Procedure Code in Act IX. of 1871 than in Act XIV. of 1859, and so we find reference to "suits, appeals, and applications," in the preamble, and again in Section 4. Thus, again, the second schedule of the Act embraces three distinct divisions, *viz.*, suits, appeals, and applications. The first division contains 150 descriptions of suits. It was argued on behalf of the defendant that the time from which the period of limitation commenced to run against Mr. Judge was 23rd March 1873, and I will assume, without admitting, that is so. It was also argued that the present application falls under Clause 85 of the 1st division of the second schedule, being by an attorney for his costs of a suit, and there being no express agreement as to the time when such costs are to be paid.

The question then arises, is an application under Rule 149 of Common Law Rules of the Supreme Court a "suit" within the meaning of Clause 85 of Schedule II. of Act IX. of 1871? I am of opinion clearly that it is not. The present application is one to the Court in the exercise of its ordinary original civil jurisdiction; and when Act IX. of 1871 wishes to allude to such applications it does so in a clear and unmistakeable manner, for we find in the third division of the second schedule each particular kind of application intended to be comprised in that division specifically described. Again, in Section 6 of the Act reference is thus made to an order of the High Court in the exercise of its original jurisdiction:—When, by any law not mentioned in the schedule hereto annexed, and now or hereafter to be in force in any part of British India, a period of limitation differing from that prescribed by this Act is specially prescribed for any suits, appeals or applications, nothing herein contained shall affect such law. And nothing

herein contained shall affect the periods of limitation prescribed for appeals from, or applications to review, any decree, order, or judgment of a High Court in the exercise of its original jurisdiction.” It is clear, therefore, that when the Legislature wished to refer to an order of the High Court in its original civil jurisdiction, it did so in proper words; and, looking at Section 6 and at Clause 169 in the third schedule, it appears impossible to hold such an application as the present a “suit” within the meaning of Clause 85 of the second schedule. Nor does it appear to me that this application comes under Clause 115 “for the breach of any contract, express or implied, not in writing registered, and not herein specially provided for,” because that, again, is a clause in the first division of the second schedule, and refers to “suits.” For the same reason I think the 118th Clause does not apply, the proceeding there being described as a “suit for which no period of limitation is provided elsewhere in this schedule.” If the words at the head of the 1st column of the second schedule had been “Description of suit, or other proceeding or application,” the case might have been different; but as the Legislature has used only the word “suit,” and the only suits specifically mentioned in the second schedule are those under the Civil Procedure Code, it must be taken that those only are the suits meant. The Court, of course, cannot extend the meaning of the word “suits” so as to include such applications as the present, but must “read the word in its popular, natural, and ordinary sense”(1). So, too, in *Abley v. Dale*(2), Jervis, C.J., in delivering judgment in a case turning on the construction of a statute, said “If the precise words used are plain and unambiguous, in our judgment, we are bound to construe them in their ordinary sense, even though it does lead, in our view of the case, to an absurdity or manifest injustice. Words may be modified or varied where their import is doubtful or obscure. But we assume the functions of legislators when we depart from the ordinary meaning of the precise words used, merely because we see, or fancy we see, an absurdity or manifest injustice from an adherence to their literal meaning.”

(1) Per Byles, J., in *Birks v. Allison*, 13 C. B. N. S. 23. Broom's Leg., Max. 569 (5th edn.) (2) 11 C. B. 378, see p. 391.

(2) 11 C. B. 378, see p. 391.

1876.
 ABBA' IL v. IL
 ISHMA'IL
 v.
 ABBA' THARA.

I have communicated with the Chief Justice with regard to the question of limitation involved in the present application, and I may say that his opinion coincides with my own; but, of course, no one except myself is responsible for the reasoning of this judgment. I find there is a case *Govind v. Narayan* (1), in which the Chief Justice himself delivered judgment on the Appellate Side of this Court on 18th June 1874, and which appears to me to be not without weight. It was there held that an application for execution of a decree was not a suit within the meaning of the Indian Limitation Act, IX. of 1871. I hold that such an application as the present, by a solicitor to compel a defaulting client to pay the costs incurred, is not a suit within the meaning of that Act.

No doubt words of limitation have been construed by the Courts in such a way as to make them bear a meaning very different from that which they actually express, but that was in consequence of a long course of decisions. In the case from Bombay which I have before cited (2), it was held by the Lords of the Judicial Committee, after two arguments, that the words "beyond the seas" in the Statute of Limitations, 21 Jac. I., Cap. 16, Section 7, were not to be construed literally. Sir John Jervis in the course of the judgment, says, "To construe the 7th Section literally would be to withhold the benefit of a saving from India, which it was intended by the Legislature should prevail where the statute was contemplated to operate at all—that is, in England, and it would be contrary to reason and justice to hold, that the Legislature should be deemed to have intended that the statute should become operative in any place where, by a due construction of the 7th Section, the saving could not apply. A necessity that the words 'beyond the seas' should be construed literally, would create a great doubt of the correctness of the decisions which hold the statute to be applicable to India."

It is not necessary for me, in disposing of this case, to express an opinion as to what was the state of the law with regard to the point now before me at the time when the Statute of James I. was still in force. Act XIV. of 1859 did not expressly repeal that

(1) 11 Bom. H. C. Rep. 111.

(2) *H. H. Ruckmaboye v. Lulloobhoy Moitichund*, 5 Moore Ind. Ap. 234. See p. 259.

statute. In fact, Act XIV. of 1859 does not contain a repealing clause at all, unless Section 18 can be so called, which says that all suits to which the Act is applicable instituted after the expiration of the period of two years from the date of the passing of the Act "shall be governed by this Act, and no other law of limitation, any Statute, Act, or Regulation now in force notwithstanding." Therefore where the provisions of Act XIV. of 1859 are different from those of the former law, the latter must be taken to have been indirectly repealed.

1876
 APBA' HAVJI
 ISHMATIL
 ALBA' THARA.

When we come to Act IX. of 1871, the first Act totally repealed by it is the Statute 21 Jac. I., Cap. 16. It would, therefore, seem that if the present were a *casus omissus*, no reliance could be placed on the Statute of James I., and consequently it is not necessary for me to give an opinion whether such an application as the present is "an action" within the meaning of the Statute of James I. Section 2 of the new Limitation Act (IX. of 1871), which is the repealing section and repealed Act XIV. of 1859 so far as it relates to limitation, is itself repealed by the General Repealing Act (XII. of 1873). Thus, we see that the Statute of James I., if it ever applied to such a case as the present, is repealed, and Act XIV. of 1859, if it ever applied, which I think it did not, is also repealed. The question, therefore, is narrowed to a consideration of Act IX. of 1871. The only clause embracing this application, to which the defendant's counsel could refer me, was Clause 85 in the second schedule, which, as I have already held, does not apply to the present case.

My opinion, therefore, is that there is no limitation to an application under Rule 149 of the Common Law Rules of the Supreme Court; consequently the answer set up on behalf of the defaulting client to the claim of his attorney fails, and I must order that the summons be made absolute with costs, and certify for costs of counsel.

The defendant subsequently presented a petition against this order by Bayley, J., to the Appellate Court, WESTROPP, C.J., and SARGENT, J., in which he stated that he was advised and believed that the order of Bayley, J., was not appealable, but prayed for the intervention and assistance of the Appellate Court to aid him in procuring the reversal of that order.

August 8.

1876. WESTROPP, C.J., on 11th August 1876, in disposing of the petition, said :—The defendant is right. There is no appeal from that order, but we do not in the least degree sympathize with him in his struggle to deprive his attorney of his costs. I may also add that we are of opinion that Mr. Justice Bayley's order was perfectly right.

[APPELLATE CIVIL JURISDICTION.]

Special Appeal No. 91 of 1876.

July 27. NĀRĀYANĀCHARYA (DELENDANT, APPELLANT) v NARSO KRISHNA AND ANOTHER (PLAINTIFFS, RESPONDENTS).

Hindu Law — Sale of ancestral property by Court — Son's interest in ancestral estate.

Under the Mitakshara and Mayukha, the son takes a vested interest in ancestral estate at his birth. But that interest is subject to the liability of that estate for the debts of his father and grandfather.

The ancestral property of a Hindu father may be sold either by himself or by a Civil Court having jurisdiction, in satisfaction of his debts, not contracted for illegal or immoral purposes, and such sale will bind sons *in esse* at the time of the sale.

Girdhāree Lall v. Kuntoo Lall and Muddun Thakoor v. Kuntoo Lall (L R. 1 Ind. Ap 321 ; S. C. 14 Beng. L R 187 ; 22 Cal. W. R. 56 (iv. Rul.) followed.

THIS was a special appeal from the decision of W. Sandwith, District Judge of Dharwar, affirming the decree of A. M. Cantem, Subordinate Judge at the same place.

This action was brought by Narso and his brother Svājirāv against Nārāyanācharya for the purpose of establishing their right to and recovering possession of two-third parts in the half share of a house. The plaintiffs alleged that the house was the ancestral property of their father Krishnāpā and his brother Sināpā and that it had been sold to the defendant in execution of two decrees, the one obtained against Sināpā alone, and the other against Sināpā and Krishnāpā jointly, and that as the

plaintiffs were each entitled to a third share in the half of the said house as sons of Krishnápá, they sought to recover the same from the defendant. The defendant, among other objections, pleaded (1) that the house descended to Krishnápá and Sinápá, not from their father Subápá, but from their uncle Venkápá, and was not, therefore, their ancestral property; and (2) that the debt for which the house was sold had been contracted for necessary purposes, and the sale was valid. Both the Lower Courts decreed in favour of the plaintiffs, on the ground that the house was ancestral property, and that, therefore, they had in it their vested shares, which could not be sold for their father's debts.

1876
NARAYANA-
CHARYA
v.
NARAYAN
KRISHNA
AND ANOTHER.

The special appeal was argued before WESTROPP, C. J., and MELVILL, J.

Máneksháh Jehángirsháh for the special appellant.—The Lower Courts were wrong in holding the house to be ancestral property in the hands of the plaintiffs' father Krishnápá. Krishnápá and Sinápá got it from their uncle Venkápá, and not from their father Subápá. Under the Mitákshara Law a son cannot prevent his father from alienating property which the latter has inherited collaterally, as in the present case, and the restriction upon the father's power of alienation applies only to his lineal ancestor's property: *Baboo Nund Coomar Lall v. Moulvi Razecooddeen Hoosein* (1). Even supposing it to be ancestral property, it was liable to be sold, under the Hindu Law, for the debts of Krishnápá and Sinápá, and Krishnápá's sons, the plaintiffs, cannot complain of such sale: *Girdháree Lall v. Kantoo Lall* (2), *Udaram v. Ranu* (3). The debt, having been contracted by Krishnápá as manager of the family, must be presumed to have been for their benefit, unless the contrary be shown, which the plaintiffs have failed to do.

Ghanashám Nilkhantha for the special respondents.—A son under the Hindu Law has, from the moment of his birth, an equal right with his father in ancestral property; Mit., Chapter I., Section 3, pl. 3, 5, 8, 9 and 10 (4), *Baboo Beer Kishore Sahye Sing v. Baboo Hur Bullub Narain Sing* (5), *Sudanund Mohaputtur v.*

(1) 10 Beng L. R. 183; S. C. 18 Calc. W. R. 477 Civ. Rul.

(2) L. R. 1 Ind. Ap. 321; S. C. 14 Beng. L. R. 187; 22 Calc. W. R. 36 Civ. Rul.

(3) 11 Bom. H. C. Rep. 76. (4) Stokes H. L. Bks. pp 391—393.

(5) 7 Calc. W. R. 502 Civ. Rul.

1876.
 NA'RA'YANA'-
 CHARYA
 v.
 NARSO
 KRISHNA
 AND ANOTHICP.

Soorjo Monee Debee (1); *Raja Ram Tewary v. Luchmun Pershad* (2); *Sudanund Mohapattur v. Soorjoo Monee Dayee* (3); *J. Rayacharlu v. J. V. Venkatara Maniah* (4). The father under that law cannot alienate immoveable property, whether ancestral or acquired by himself, without the consent of his sons; Mit., Chapter I., Section 1, pl. 27 (5); 1 Norton's Leading Cases, p. 214. Hence it is that a son can set aside an alienation made by his father of ancestral property without any family necessity; *Honooman Dutt Roy v. Bhag But Kishen* (6); *Jugdeep Narain Singh v. Deendial* (7). A father and son, by the Hindu Law, are coparceners of a joint family, and, therefore, subject to the same rules. Each has a distinct interest in the family property, though that interest is undivided. The father has no more control over the son's interest in the ancestral property than the managing coparcener has. The son's interest in the ancestral property being distinct, is not liable for any debts contracted by the father, unless they are incurred for a family necessity. Moreover, what was sold to the defendant at the Court's sale was the right, title, and interest of Krishnápá in the house. The sale, therefore, did not affect the rights of the plaintiffs.

The learned pleader also referred to Bombay Act VII. of 1866, and *Máhabeer Persad v. Ramyad Singh* (8).

Máneksháh Jehángirsháh, in reply, referred to *Muddun Gopal Lall v. Mussamut Gowrunbutty* (9), and said that Mr. Justice Phear in that case, following the ruling of the Privy Council in *Girdharree Lall v. Kantoo Lall* (10), would appear to have changed his mind since his decision in *Jugdeep Narain Singh v. Deendial* (11).

The judgment of the Court was delivered by

WESTROPP, C.J.—Subápá had two sons, Krishnápá and Sinápá (alias Shrinivás), who, it is alleged by the plaintiffs, inherited the

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| (1) 8 Calc. W. R. 455 Civ. Rul. | (2) 8 Calc. W. R. 15 Civ. Rul. |
| (3) 11 Calc. W. R. 436 Civ. Rul. | (4) 4 Mad. H. C. Rep. 60. |
| (5) Stokes H. L. Bks. 375. | (6) 15 Calc. W. R. 6 F. B. |
| (7) 12 Beng. L. R. 100; S. C. 20 Calc. W. R. 174 Civ. Rul. | |
| (8) 12 Beng. L. R. 90; S. C. 20 Calc. W. R. 192 Civ. Rul. | |
| (9) 15 Beng. L. R. 264; S. C. 23 Calc. W. R. 365 Civ. Rul. | |
| (10) 14 Beng. L. R. 187; S. C. 22 Calc. W. R. 56 Civ. Rul. | |
| (11) 12 Beng. L. R. 100; S. C. 20 Calc. W. R. 174 Civ. Rul. | |

house, the subject of this suit, from their father Subápá. While Krishnápá and Sinápá were undivided in estate, one undivided moiety of the house was, by public auction, sold by a Civil Court in execution of a decree obtained against Sinápá, and the other undivided moiety was also by public auction sold by the same Court to the defendant Náráyanácharya in execution of a decree obtained against Sinápá and Krishnápá. Narso and Svájiráv, the sons of Krishnápá, have brought their suit against Náráyanácharya to recover two-thirds of a moiety of the house on the ground that at the time of the sale to Náráyanácharya they had a vested interest to that extent in their father's undivided moiety of the house.

1876.
NÁRÁYANÁ-
CHARYA
v.
NARSO
KRISHNA
AND ANOTHER.

On behalf of the defendant it has been questioned whether the house was ancestral property of Krishnápá and Sinápá, and alleged that they acquired it from their uncle Venkápá, brother of their father Subápá and *Baboo Nund Coomar v. Moulvi Razeeoodeen Hoosein* (1) has been cited to show that the house, having been thus acquired from a collateral kinsman, and not from a lineal ancestor, cannot be regarded as ancestral. But it is unnecessary for us to consider either the law or the fact as to the mode in which Krishnápá and Sinápá succeeded to the house, for, even assuming that the contention of the plaintiffs is correct, viz., that the house was ancestral property in the hands of Krishnápá and Sinápá, we think that the plaintiffs must fail in their suit, and that the sale to the defendant was binding upon them. The sale was unquestionably made by the Court in or towards satisfaction of a debt of Krishnápá as well as of his brother Sinápá; and there is not any allegation that such debt was contracted for purposes either illegal or immoral. That being so, it is settled by the highest authority that even the ancestral property of the father may be sold either by himself or by a Civil Court having jurisdiction in satisfaction of such debt, and that such sale will bind sons *in esse* at the time of the sale: *Gridháree Lall v. Kantoo Lall* and *Muddun Thokoor v. Kantoo Lall* (2), *Hunooman Persaud Panday v. Mussamut Babooee Munraj Koonweree* (3), in which last case it was said by Knight Bruce, L. J., (at page 421) in giving judg-

(1) 10 Beng. L. R. 183; S. C. 18 Cal. W. R. 477 Civ. Rul.

(2) 14 Beng. L. R. 187; S. C. L. R. 1 Ind. App. 321; 22 Cal. W. R. 56 Civ. Rul.

(3) 6 Moore Ind. App. 393.

1876.
NARAYANA-
CHARYA
P.
NARSO
KRISHNA
AND ANOTHER

ment, that, "by the Hindu law, the freedom of the son from the obligation to discharge the father's debt has respect to the nature of the debt and not to the nature of the estate, whether ancestral or acquired by the creator of the debt." That was a case decided in accordance with the Mitākshara. The liability of ancestral estate in the hands of sons or grandsons to the debts of the father or grandfather is provided for by special texts, *ex gr.* Nārada (1).—"A father being dead, his sons, whether after partition or before it, shall discharge his debt in proportion to their shares, or that son alone who has taken the burden on himself; and Vrihasputi (2) says that "the father's debt must be first paid, and next a debt contracted by the man himself; but the debt of the paternal grandfather must even be paid before either of those; 2, "The sons must pay the debt of their father, when proved, as if it were their own, or *with interest*; the son's son must pay the debt of his grandfather *but* without interest; and his son or the great-grandson shall not be compelled to discharge it *unless he be heir and have assets*," and see I. Dig. Bk. I., ch. V., pl. CLXX, CLXXVII., CLXXIII., CXCVI., CXCVII., *et seq.* And nowhere was the responsibility of the sons and grandsons of a Hindu for their father's and grandfather's debts more stringent than in the Mofussil of this Presidency. Until the Bombay Legislature, at the suggestion of Mr. White, intervened in their favour by passing Bombay Act VII. of 1866, they were personally liable for the debts of those ancestors, whether or not they received assets from them. It is true that under the Mitākshara and Mayukha the son takes a vested interest in ancestral estate at his birth, but that interest is subject to the liability of that estate for the debts of his father and grandfather.

An attempt was made to distinguish a sale by private transfer from an execution sale, by which latter, it is said, only the *right*, title, and interest of the judgment debtor is sold. But it is, as we have seen, the *right* of that debtor to appropriate even ancestral estate in payment of his debts, and such an appropriation has been upheld by the Privy Council in the two appeals in 14 Beng. L. R., first above-mentioned by us, in one of which the sale was by private transfer and in the other by judicial order. It may be said that the latter sale was under Act IV. of 1846, the 10th

(1) 1 Dig. Bk I. ch. V., pl. CLXIX.

(2) 1 Dig. Bk. I. ch. V., pl. CLXXVII.

Section of which puts judicial sale on the same basis as private transfers, and not under the Civil Procedure Code. But Sir B. Peacock, in giving the judgment of the Privy Council, did not take any distinction between a judicial sale under that Act and a judicial sale under the Civil Procedure Code. The plaintiffs have relied on the decision of Phear, J., in *Jugdeep Narain Singh v. Deendial* (1), but that decision was made previously to the Privy Council decision in *Girdhāree Lall v. Kantoo Lall* (2).

We reverse the decrees of the Courts below, and make a decree for the defendant Nārāyanācharya, and we direct the plaintiffs to pay to him the costs of the suit, but order that the parties respectively shall bear their own costs of both appeals.

1876.
NĀRĀYANĀ-
CHARYA
v.
NARSO
KRISHNA
AND ANOTHER.

[APPELLATE CIVIL JURISDICTION.]

Miscellaneous Special Appeal No. 9 of 1876.

GOPAL NĀRĀYAN (ORIGINAL PLAINTIFF, APPELLANT) v. TRIMBAK SA'DA'SHIV AND ANOTHER (ORIGINAL DEFENDANTS, RESPONDENTS). August 8.

Registration Act VIII of 1871, Section 17—Assignment of a decree for sale of mortgaged property.

Where a mortgagee obtained a decree against his mortgagors for the payment of the mortgage moneys, and in default for the sale of the mortgaged property, and his heir afterwards executed an assignment of the decree, for valuable consideration, to the plaintiff, who proceeded to execute the decree by sale of the mortgaged property.

Held that the assignment was a document of which the registration was compulsory,

THIS was a miscellaneous special appeal from the order of F. R. Mactier, District Judge at Satara, affirming the order of Krishnarāy Vithal Vinchurkar, 1st Class Subordinate Judge at the same place.

One Nāro Bāpuji obtained a decree on a mortgage deed against two brothers Trimbak and Ganesh, in the Court of the

(1) 12 Beng. L. R. 100; S. O. 20 Calc. W. R. 174 Civ. Rul.

(2) L. R. 1 Ind. App. 321; S. C. 14 Beng. L. R. 187; 22 Calc. W. R. 56 Civ. Rul.

1876

GOPÁL
NÁÍO'S SON-
" TRIMBAK
SÁ'DÁ'SHIV
AND ANOTHER.

1st Class Subordinate Judge at Satara, under date the 22nd January 1868, for Rs. 1,600, to be realized by the sale of a house belonging to the defendants and mortgaged by such deed. The plaintiff, Gopál, purchased this decree for Rs. 700 from Náio's brother and heir, Dámodar, who executed a writing purporting to assign the decree to the plaintiff on 6th January 1875; the plaintiff proceeded to execute the decree against Trimbak and Ganesh. The defendants moved in bar of execution, on the ground that the deed of assignment, which was Gopál's authority for executing the decree, was not registered. The Subordinate Judge allowed the objection, and held that the assignment ought to have been registered under Act VIII. of 1871, Section 17.

In appeal that decision was upheld by the District Judge. He observed :—" The deed of sale, under which this decree was transferred from Dámodar to Gopál, purported to assign to Gopál certain interest in immoveable property, for it gave to him the liberty to sell by auction, by executing the decree against it, the defendant's house; and this liberty to sell was certainly an interest in immoveable property, and the decision of the Subordinate Judge was, I think, right, and must, therefore, be confirmed."

In special appeal the same point was raised.

The special appeal was heard before WESTROPP, C. J., and KEMBALL, J.

Shámráv Vithal for the special appellant.

Frámji Kalkhasru for the special respondent.

Per Curiam :—We concur in the decision of the Lower Courts, and dismiss the appeal with costs.

Orders affirmed.

[ORIGINAL CIVIL JURISDICTION.]

*Suit No. 267 of 1875.*MA'NIKLA'L ATMA'RA'M (PLAINTIFF) v. MANCHERSHI DINSHA'
COACHMAN (DEFENDANT).1876
June*Will—Construction—Vendor and Purchaser—Hindu will—Executor's estate—Trustee—Bona fides—Notice—Charity—Limitation—Act IX. of 1871, Section 10, and Schedule 2, Clause 134.*

B.K., a Hindu, by his will, executed in Bombay and dated 6th January 1802, bequeathed a house to his wife, R, for her life, in trust to allow the impersonations of Valabh to reside in it, and appointed four executors by name, but made no gift over of the house to those executors or to any one else. The will was proved by the four executors on 24th September 1808. On 23rd June 1820, R., claiming as executrix according to the tenor, obtained an order granting probate to her as well as to the executors expressly appointed. The executors retired, and R. acted alone in the management of the testator's estate. On 4th September 1862, R. sold the house for its full value to the defendant, who had notice of the charitable trust affecting it. R. died on 23rd March 1870. On 17th March 1871, the High Court, on the application of one A. T., revoked the probate of B. K.'s will granted to R, but without prejudice to any act done in due course of administration by R., and granted letters of administration, *cum testamento annexo* and *de bonis non* of B. K., to A. T. On 13th July 1873, A. T. died. On 1st May 1875, the plaintiff, who was the only son and heir of A. T, instituted the present suit for the purpose of recovering from the defendant possession of the trust premises sold to him by R. The plaintiff was also one of the surviving heirs of B. K., and by virtue of a release executed to him by the other heirs, was the sole surviving heir, who had any beneficial interest in B. K.'s estate. The plaintiff, however, did not claim the house in the possession of the defendant as the beneficial owner, but to hold it for the purpose of giving effect to the trust created by the will of B. K. On 28th January 1876, the plaintiff obtained letters of administration *cum testamento annexo* and *de bonis non* of B. K., and it was on these letters that he now based his claim.

Held, 1st, that the plaintiff had no ground of action as administrator of B. K.

Held, 2ndly, that independently of the provisions of the Indian Succession Act and the Hindu Wills Act, 1870 (which were not applicable to the case), the executors of a Hindu do not, in the character merely of executors, take any estate, properly so called, in the property of the deceased. That accordingly, on the death of R., the devisee for life in trust, there being no gift of the premises to the executors named in the will, the ownership in the premises would devolve upon the surviving heirs of the testator subject to the trust, and such heirs would accordingly be trustees under or by reason of the will of their ancestor, though succeeding to the property in their character of heirs. That the trusteeship thus vesting in all the surviving heirs, the release, though operative to pass the legal estate, so as to vest it in the plaintiff alone, could not vest the trusteeship in him alone, and that accordingly the plaintiff could not maintain this suit unless joined by the other heirs of B. K.

1876.

MA'NIKLA'L
ATMA'RA'M
v.
MANCHERSHI
DINSIA'
COACHMAN.

Held, 3rdly, that even if the other heirs of B. K. had joined as plaintiffs, still the suit, being one by trustees to disaffirm the completed act of a predecessor against the person claiming by virtue of such act, would not lie.

Held, 4thly, that the words "conveyed in trust" in Article 134 of Schedule II. of the Indian Limitation Act (IX. of 1871), include devises in trust, or are equivalent to the words "vested in trust" in Section 10 of the same Act. That the words "in good faith" in Article 134 of Schedule II. and in Section 10 of the Indian Limitation Act (IX. of 1871), do not necessarily involve absence of notice in the purchaser of an existing trust or equity, though the fact of there being such notice may be an important element in the question whether there was *bona fides*, and that the defendant in the present case, though he purchased with actual notice, must, having regard to all the circumstances, be held to have purchased in good faith, and that the suit was accordingly barred by Limitation, and that there is nothing in the Indian Limitation Act (IX. of 1871), excluding from its benefit those asserting their right to claim under a *bona fide* purchase for value, by reason that those claiming against them are the objects of a charitable trust imposed on such property.

Semble that as it appeared that the impersonations of Valabh never had availed themselves, and never were likely to avail themselves, of the house, the sale of it by R. to the defendant was not a breach of trust.

THE plaintiff, on 1st May 1875, as administrator *cum testamento annexo* and *de bonis non* of one Bhugwan Kulla, sued, for the purpose of giving effect to a charitable trust created by the will of Bhugwan Kulla, to recover possession of a piece of ground, with a house and buildings on it, in Bora Bazaar Street. This property was formerly part of the estate of Bhugwan Kulla, a Hindu, who died on 8th January 1807, without male issue, but leaving a widow, Rajkuver. The material portions of his will, executed in Bombay and dated 6th January 1802, were as follows:—

" Clause I.—As long as I myself am alive, I am the owner, and, in the event of my decease, you, Rajkuver, are the owner. In the event of my decease, all my property and ready money, and house, and effects, and oart, and such debts and claims as may be found in my books, are made over to my wife Rajkuver. To take care of the same I have appointed four executors. She should act in accordance with what is written below. Should it be necessary to do anything more or less than that, she may do so on having consulted the executors.

"Clause 8.—The house known as that of Makaset, situated in the Fort, is given by me to the seven *mandirs* (temples) of the Sri Valabh family for the members thereof to put up at. The condition thereof is as follows:—Any impersonation of Valabh (explained by the translator to mean any Maharaj of the Vaishnav Valabh-acharya sect) who may arrive here, may put up in it for six months. He shall not remain longer in it than that time. After the decease of my wife shall have taken place, the repairs of the breaks and dilapidations of the house shall be made out of the warehouse rent and shop rent that may be yielded. I give such authority to my executors. * * * * *

"Clause 11.—In the event of my wife's decease, her funeral outlays having been made, up to the year's ceremony (*vars*), do you be pleased to appropriate to religious and charitable purposes half the property out of what may remain. Do you be pleased to divide and give to my *titrái* (relations on the father's side) the other half, according to what my wife may state in writing and make known, do you be pleased to make outlays after her. As to what may remain, half shall be for religious and charitable purposes (*dharm*), half for my *titrái*."

In enumerating the particulars of his property the testator thus described the premises in dispute in this suit:—"One house known as that of Makaset purchased at an auction. It has been rebuilt." The will was proved, by the four executors named in it, on 24th September 1808, in the Recorder's Court, in solemn form in a contested suit, and after *viva voce* examination of witnesses. In 1819, Rájkuver applied to the Recorder's Court for probate of the will of her deceased husband, contending, apparently, that she was executrix according to the tenor. On 23rd June 1820 an order was made, granting probate to her "as well as to the other executors of the said will." In or soon after the year 1826, it appears that the surviving executors retired from the management of Bhugwán Kulla's estate, and that Rájkuver alone managed it down to the time of her death, which occurred on 23rd March 1870.

On 4th September 1862, Rájkuver sold the premises, the subject of the present suit, which were then in a dilapidated condition, to the defendant, and by an indenture of that date, purporting to

1876.

MA'NIKLA'L
ATMA'RAM
v.
MANCHERSHI
DINSHA'
COACHMAN.

1876.

MA'NIKLA'L
ATMA RA'M
v
MANCHERSHI
DINSHA'
COACHMAN.

be executed by her as widow and executrix of Bhugwán Kulla deceased, in consideration of the sum of Rs. 13,000, conveyed them to the defendant, who at the same time entered into possession and proceeded to lay out considerable sums in repairing the house.

Rájkuver, by her will, executed in Bombay, dated 7th July 1869, appointed Atmárám Trikamdás, the father of the plaintiff, one Ganpatráam Hemji, and two others, her executors. This will was proved by Ganpatráam alone.

In 1871, the High Court, on the application of Atmárám Trikamdás, ordered a citation to issue, calling on Ganpatráam Hemji and the other executors of the will of Rájkuver, except the applicant, to bring in and deposit in Court the probate of the will of Bhugwán Kulla granted by the Recorder's Court to Rájkuver and to show cause why the said probate should not be revoked, varied, or amended, and why letters of administration, with the will annexed, of the unadministered estate of Bhugwán Kulla should not be granted to the applicant Atmárám Trikamdás. Ganpatráam Hemji alone showed cause, and entered a *caveat*. On 17th March 1871 it was ordered that the probate to Rájkuver should be revoked and cancelled, but without prejudice to any act theretofore done by Rájkuver or her executor, the *caveator*, in due course of administration, and that letters of administration, *cum testamento annexo* of the estate and effects of Bhugwán Kulla left unadministered, should be granted to the applicant. The grounds for this order, as stated in it, were that it appeared to the Court that the heirs and next of kin of Bhugwán Kulla had not all been cited on the application of Rájkuver for probate in 1819, and that it appeared that Rájkuver was not appointed executrix according to the tenor.

ing heirs having by four several conveyances, executed in the course of 1874, for the valuable considerations in such conveyances respectively mentioned, released, and assured to the plaintiff, his heirs, and assigns for ever, all the right, title, and interest in the conveying parties respectively, as the heirs of the late Bhugwán Kulla, deceased, in the lands and hereditaments particularly described in the schedules to the conveyances, among which is enumerated the house, the subject of this suit. At the hearing of this suit before GREEN, J., eight issues were raised, of which the following two only are material to this report :—(1) whether the plaintiff is entitled to maintain this suit in respect of the house and premises mentioned in para. 1 of the plaint; (7) whether this suit is not barred by the Limitation Act.

Marriott and Farran for the plaintiff.—On a true construction of the will of Bhugwán Kulla, his executors were the trustees, appointed for the purpose of giving effect to the charitable trust declared concerning this house at any rate, after the death of Rájkuver. The plaintiff, therefore, being the holder of letters of administration *cum testamento annexo* and *de bonis non* of Bhugwán Kulla, is now the sole trustee, and, therefore, entitled to sue alone. Moreover, if the trust be an incident to the right to the property, the whole legal estate is now vested in the plaintiff alone.

[GREEN, J.:—You are suing, as trustee, to annul the act of a former trustee, which act it was that gave the defendant his title]

That act was clearly a breach of trust, and the defendant had notice of the trust. A suit lies to annul such act of a trustee either by a co-trustee or a *cestui que trust*.

The defendant cannot avail himself of the Limitation Act; for, having notice of the existence of the trust, he cannot be said to have purchased “in good faith.” The whole doctrine of notice is based on the theory that a purchaser with notice of a trust or equity, in taking the legal estate, is acting *malá fide* in fraud of the right of a third party. How, then, can such a purchaser be said to have purchased “in good faith?”

Scoble, Advocate General, and *Latham* for the defendant.—There was no breach of trust in the sale to the defendant. The house being in a ruinous condition, Rájkuver exercised a wise discretion in selling it.

1876.

MA'NIKLA'L
ATMA'RA'M
v.
MANCHERSHI
DINSHA
COACHMAN.

1876.
 MA'NIELA'L
 ATMA'RAM
 v.
 MANCHERSHI
 DINSHA'
 COACHMAN.

Even if the sale to the defendant were a breach of trust, the plaintiff cannot maintain this suit for two reasons. First, because on the death of Rájkuver, the executors of Bhugwán Kulla's will not having been appointed trustees, and there being no gift over of this house, the right to it, subject to the trust, vested in all the surviving heirs of Bhugwán Kulla, of whom the plaintiff is only one. By their conveyances to the plaintiff the legal estate might be vested in him, but not the character of trustee, which vested in them all equally at the moment of Rájkuver's death, and, therefore, in this suit they should all be plaintiffs. But, secondly, even so the suit would not be maintainable, for the reason suggested by the Court at the commencement of the hearing. There is no precedent for a suit by a trustee to annul, on the ground that it was a breach of trust, the act of himself or a former trustee as against the person who claims under such act.

The defendant is entitled to rely on the Limitation Act. Section 10 and Clause 134 of Schedule 2 of Act IX. of 1871 were evidently intended to protect purchasers with notice, for purchasers without notice are sufficiently protected by the very fact that they had not notice. The words "in good faith," therefore, in the Limitation Act must mean only good faith as between the purchaser and the vendor. At any rate, they cannot be held to render necessary in the purchaser a want of notice of existing equities, for in that case the Act would be wholly needless.

GREEN, J., stated the facts, and then continued:—The first question is, having regard to the construction to be put on the will of Bhugwán Kulla, and the events that have happened, what is the position and what are the rights of the plaintiff? As to the construction to be put on the will, it is to be observed, in the first place, that there does not appear to be any general disposition of the testator's property unless such general disposition be contained in the 1st and 11th clauses. The executors named as such in the will have various powers given to them by the will, but I do not find any gift to them of the estate. Taking the 1st clause alone, there would, in my opinion, be a gift of the whole estate to the widow, subject, of course, to the legacies and devises, pecuniary and specific, contained in the will, and subject to the

But the 2nd clause, in conjunction with the 11th clause, shows, in my opinion, that the testator did not intend that his wife should take his general estate for her own benefit absolutely, with power of free disposal thereof at her discretion. On the other hand, there is no gift of the estate to the executors, and, in the absence of such gift, it would seem that, independently of the provisions of the Indian Succession Act X. of 1865, as applied by Act XXI. of 1870 to the wills executed, within the local limits of the ordinary civil jurisdiction of the High Courts, by Hindus after 1st September 1870, the executors of a Hindu do not, in the character merely of executors, take any estate, properly so called, in the property of the deceased; or, in other words, that the mere nomination of executors, though followed by probate, does not, of itself, confer any estate on the executor further than the estate he may have by the express words of the will, or as heir of the testator. In respect, in particular, to the premises in question here, namely, "the house known as that of Makaset," there is no gift to the executors. The only power given to the executors, with reference to it, is the very limited one that, after the wife's decease, the executors are to repair "breaks and dilapidations" out of what is referred to as "warehouse rent and shop rent." During the wife's life, they have, by the will, neither estate nor even power or obligation to repair. This, conjoined with the 1st clause, in my opinion, leads to the conclusion that the wife, for at least her life, was to be owner of this property, subject to the declared purpose that any impersonation of Valabh, arriving in Bombay, might put up there for a period not exceeding six months at a time. If so, Rájkuver was devisee, for her life at least, of the premises in question, subject to a certain trust or purpose. I do not consider that she took more than a life estate, for the reason, mainly, that after her death the executors of the will, not *her* heirs, were to keep the place in repair. This devise for life in trust, however, she took under the dispositions of the will itself, and quite independently of the character of executrix recognised, or given to her, by the grant of probate in June 1820 by the Recorder's Court. Her character of devisee for life in trust being, as I consider it, quite independent of the grant of probate to her, would be unaffected by the revocation of that grant by the order of this Court of 17th March

1876.

MA'NIKLA'L
ATMA'RAM
v.
MANCHERSHI
DINSHA'
COACHMAN.

1876.

MA'NIKLA'L
ATMA'RAM
v.
MANCHERSEI
DINSHA'
COACHMAN.

1871. Indeed, it appears that in English Law, where the same persons are appointed by the will executors and trustees, the revocation, by the testator himself, of their appointment as executors, does not revoke the devise to them as trustees: *Graham v. Graham* ⁽¹⁾, *Cartwright v. Shephard* ⁽²⁾, and *Worley v. Worley*. ⁽³⁾ Now if, as I construe the will, Rajkaver was devisee of these premises for her life in trust, and there was no gift of them to the executors named in the will, the ownership in them, on her death, would devolve upon the surviving heirs of Bhugwan Kulla, subject to the obligation of allowing them to be used for the purposes intended by the testator. In other words, they would be trustees under or by reason of the will of their ancestor, though succeeding to the property in their character of heirs.

But the testator, in my opinion, nowhere manifests his intention that his executors as *such* should be trustees of these premises. Even had he appointed them trustees and executors of his will, yet the plaintiff, by obtaining a grant to himself of letters of administration *cum testamento annexo* and *de bonis non*, though he thereby became personal representative, would not become trustee of the will of the testator: Lewin on Trusts (4th edn.) ch. xi. § 14. The plaintiff might, it seems, have a ground for claiming, as one of the surviving heirs of Bhugwan Kulla, though not as mere administrator under a grant of letters by this Court, to have possession and management of the premises, admitting the trust imposed by the will, and the first and only devisee in trust having died. But the estate and trust would vest in all the surviving heirs of Bhugwan Kulla, and not in the plaintiff alone. The conveyances by the other surviving heirs to the plaintiff, though they may operate to vest in the plaintiff what in English law would be called the legal estate in the premises in question, would not transfer the trusteeship, so as to enable the plaintiff alone to sue: *Burt's Estate* ⁽⁴⁾.

The plaintiff does not, however, claim the property in question as beneficial owner. His case is that he is entitled to recover possession in his character of administrator *cum testamento annexo* of Bhugwan Kulla. He professes to treat as still binding and operative the declaration in Bhugwan Kulla's will that, this pro-

(1) 10 Beav. 550. (2) 17 Beav. 301. (3) 18 Beav. 53. (4) 1 Deen. 319.

perty is to be used for the temporary shelter and accommodation of any impersonation of Valabh (or Maharaj) who may arrive here, and he professes that, if possession of the property is awarded him, he will hold the property for that purpose. But as I have said, I am unable to understand how merely in the character of administrator *cum testamento annexo* the plaintiff, can maintain this suit at all.

Nor can he, in my opinion, for the purpose of maintaining this suit, fall back upon and revert to his right, as an heir of the testator, to recover possession of the premises, admitting them to be subject to a trust. There are, as I have said, other persons, besides himself, who also fill this character and are not parties to this suit, and the fact that they have executed conveyances to him does not, in my opinion, give him the right to sue alone, where he sues as trustee, though, perhaps, it might have done so had he been claiming a beneficial interest. In the present case, however, the plaintiff expressly disclaims any such beneficial interest.

Independently of all this, there is, in my opinion, another objection to the plaintiff maintaining this suit, and an objection which would have been equally strong had the surviving heirs of Bhugwan Kulla been joined as plaintiffs. In whatever way the plaintiff's position is looked at, it comes to that of one, claiming to act as trustee under a will, seeking to undo an act of one who was also trustee under the same instrument. If Rajkuver had, in her life-time, filed a suit against the present defendant, saying "True, I have conveyed this house to you (the defendant), and you have paid to me Rs. 13,000 as purchase money, and have since laid out as much again upon it; but the conveyance by me was a breach of trust, and you had the means of knowing that it was so, and you must, therefore, restore me the property, and resign yourself to the loss of the purchase money and expenditure." I apprehend such a suit would not be listened to. A trustee, as between himself and one to whom he has conveyed trust property, is, I apprehend, as much concluded by his own completed act as any other vendor. So, again, I apprehend, the completed act of a former trustee, though in itself a breach of trust, is as conclusive against a successor in the trusteeship, where it is the

1876.

MA'NIKLA'L
ATMA'RA'M
2.
MANOHERRI
DINSIA'
COACHMAN.

1876.

MA'NIKLA'L
ATMA'RA'M
v.
MANJESHI
DINSHA'
COACHMAN.

successor who, in a suit against one claiming under and by virtue of such act, is seeking to disaffirm and annul it. We find, no doubt, cases of one trustee, who has been innocent of any breach of trust, suing a co-trustee, or the representatives of a deceased trustee, to restore property disposed of by breach of trust, or its value. There are also many cases to be found of *cestuis que trust* suing a trustee who has, in breach of his trust, disposed of property, and joining as defendant in such suit the party who has purchased the property with notice of the breach of trust. But in these cases the act sought to be annulled is not the act of the plaintiff or his predecessor in estate, and has no similarity to the case of a trustee seeking to disaffirm his own act, or that of a predecessor, as against the person claiming by virtue of such act. This difficulty in the plaintiff's way occurred to me early in the course of the hearing of the present case. The defendant's counsel in stating the case of the defendant, maintained that no precedent could be found of a suit of the nature of the present one, and the plaintiff's counsel did not profess to have found any, though such precedent was called for early in the course of a hearing which lasted several days. Without saying anything as to the probable fate of this suit had it been instituted by the Advocate General on behalf of impersonations of Valabh visiting, or who might visit Bombay, it cannot, in my opinion, be maintained in its present form.

Another question has been raised in defence, that, namely, of the Limitation Act IX of 1871, on which it is necessary to make some observations. The present suit was instituted on 1st May 1875, and the question is—whether the defendant, having a conveyance to himself of the property dated 4th September 1862, and possession, from that time, of such property under the conveyance, is not entitled to rely on this defence. It will be seen that more than 12 years had elapsed between the execution of the conveyance and the institution of the suit. The portion of the Act applicable to this case is, I think, Article 134 of the 2nd Schedule, and regard is also to be had to Section 10 of the Act itself. By the 134th article, 12 years, reckoned from the date of the purchase, is prescribed as the period of limitation for suits to recover possession of immovable property, conveyed in trust, or mortgaged, and afterwards purchased from the trustee, or

mortgage, in good faith and for value" The words "conveyed in trust" must, I think, be construed to include devises in trust, or, perhaps, as equivalent to the words "vested in trust" of Section 10, though it is not in accordance with ordinary legal language to call a disposition by will a conveyance Unless this be done, however, and it is, after all, no great violation of language, the majority of cases in which, in this country at least, immoveable property becomes vested in trustees, would be excluded from the article in question, without the case of a purchaser from such trustee being appropriately provided for elsewhere. Section 10 of the Act is as follows—"Notwithstanding anything hereinbefore contained, no suit against a person in whom property has become vested in trust for any specific purpose, or against his representatives, for the purpose of following in his or their hands such property, shall be barred by any length of time." Then follows an explanation: "a purchaser in good faith for value from a trustee is not his representative within the meaning of this section."

1876.

MA NIKLA'L
ATMARA'MMANCHESHI
DINSHA'
COACHMAN.

It was contended that the defendant could not rely on the 134th article of the 2nd Schedule, nor on the exceptive explanation in Section 10 of the Act, on the ground that he was not a *bond fide* purchaser, as having had notice of the will of Bhugwan Kulla, and, therefore, of the charity, by reason that Rajkuver, on the very face of the conveyance to the defendant, is described as widow and executrix. There is, however, no necessity in the present case to resort to the principle of *constructive* notice, and to treat the defendant, by reason of the fact of the description, in the conveyance of September 1862, of his vendor Rajkuver, as widow and executrix of Bhugwan Kulla, as having had notice of the contents of Bhugwan Kulla's will From the evidence of the defendant himself it appears that he had *actual* notice, before the completion of his purchase, from the statement of Rajkuver herself, that she was selling under a "power" from the Court; that the house had belonged to her husband, Bhugwan Kulla; and that it had been set apart for charity. But I am of opinion that the words "good faith," in Article 134 of the 2nd Schedule and in Section 10 of the Limitation Act, do not necessarily involve absence of notice. In other words, for the purpose of the Limita

1876.

MA'NIKLA'L
ATMA'RA'M
v.
MANCHERSHI
DINSHA'
COACHMAN.

tion Act, there may well be a purchaser *bonâ fide* and for value, who, with notice of a trust or equity, takes his purchase. No doubt, notice of a trust or equity may be an element, and an important element, in the question whether there was *bonâ fides*, or an absence of *bonâ fides*, on the part of one who purchases from a trustee or mortgagee. That mere notice of a trust or equity is not intended to preclude a purchaser for value from a trustee or mortgagee from insisting that he is a purchaser *bonâ fide*, is, I think, clear from this, that on any other construction Article 134 would be superfluous. A purchaser for value from a trustee or mortgagee, without notice of any trust or equity, is protected from the moment he has completed the purchase by conveyance and payment of purchase money. He has no necessity to rely on any Limitation Act. Surely it is superfluous and would be absurd to provide that, whereas on a principle of law, quite independent of any Limitation Act, a purchaser for value without notice is protected and unassailable from the moment he completes his purchase, yet that after he has been in possession, for 12 years, or after the lapse of 12 years from his purchase, he may plead the Limitation Act. Though in the case in the Privy Council, *Radanath Doss v. Gisborne*⁽¹⁾ their Lordships held that the defendants were not entitled to the benefit of the Limitation Act as not being *bonâ fide* purchasers, and rely on the circumstances of the case of which the defendants had notice as (*inter alia*) excluding them from being *bonâ fide* purchasers, yet I do not find anything in the judgment inconsistent with the statement of the law to be found in *Sitha Ummal v. Rungasami Iyengar*⁽²⁾ "that the question of *bonâ fide* purchaser is one of fact, that notice of facts from which the infirmity of the vendor's title may be inferred is evidence more or less cogent of *mala fides*, but is not itself *mala fides*," and that it is open to a Judge "to find that the mistake as to the law under which all the parties have for a long series of years been labouring was *bonâ fide*, and that despite its existence the purchase was *bonâ fide*." I am of opinion that, under the Indian Limitation Act, absence of notice of the infirmity of the vendor's title, by reason of some trust or equity affecting the property in the vendor's hands, is not necessary in

⁽¹⁾ 12 Moore Ind. App. L. S. C. *nomine Radanath Das v. Scott Elliott and others*, 1869, L. R. 530.

other that a purchaser for value from a trustee or mortgagee may insist on the character of *bonâ fide* purchaser for value, and this for the simple reason which I have mentioned, that a purchaser for value from a trustee or mortgagee, without notice of any trust or equity affecting the property, is protected already independently of any Limitation Act. Comparing the Indian Limitation Act with those in force in England, in reference to this matter, we find the former less liberal in the protection of a purchaser for value than the latter. In order that a purchaser from a trustee or mortgagee may claim the protection of the Indian Limitation Act, he must show, not only that he gave value, but that the purchase was *bonâ fide*, whereas under Sections 2, 24, and 25, of 3 & 4 W11 IV, C 27, the last English Limitation Act, a purchaser for valuable consideration from a trustee or mortgagee is protected by the lapse, after the time of the conveyance to him, of the statutory period of Limitation, supposing, of course, no disability to sue operating to prolong that period, and that, whether there was notice or not of any trust or equity, and whether there was *bonâ fides* or not on the part of the purchaser : *Petre v. Petre*⁽¹⁾

1876.

MĀNIKLĀL
ĀTMARĀM
v.
MANCHERSHI
DIN'SHA'
COACHMAN,

These considerations would have led me to agree in the statement of the law by Noiman and Campbell, J J., in the case of *Radanath Doss v Gisborne*⁽²⁾ when before them, but I should have difficulty in holding that that statement of the law can be maintained to its full extent, having regard to the judgment of the Privy Council in appeal in the same case.⁽³⁾

I may add that I have not omitted to consider the bearing on the present case of the decision of Couch, C J., in this Court in the case of *Mancharji Sorabji Chulla v. Kongseoo and others*⁽⁴⁾. But there there was no question of the Limitation Act, and the language of the Judge in the passage "The established doctrine of Courts of Equity is, that if a purchaser of an estate at its full value takes with notice of a trust, he is (subject to the protection afforded by the statutes of limitation) bound to the same extent and in the same manner as the person of whom he purchased," seems rather to indicate that, as a general principle, a pur-

(1) 1 Drew 371.

(2) 5 Calo. W. R. 253 Civ. Rul.

(3) *Vide supra* p. 280 note (1).

(4) 6 Bom. H. C. Rep. 59 O. C. J.

1876.

MA'NIKUL
ATYA'RAM
v.
MANCHI RSHI
DINSHA'
COACHMAN

chaser for value, though with notice of a trust, is protected by the limitation statutes

It remains, then, to consider the whole circumstances of the purchase as bearing upon the question whether the defendant can be held to be a *bona fide* purchaser for value. That he gave value, and full value, for the house at the time, is not disputed. Though it may be supposed that the testator, at the time he made his will, knew whether or not the objects he intended to benefit in devoting this house to the reception, on their temporary visits to Bombay, of impersonations of Valabh (commonly called Maharajas of the Valabhacharya sect,) would be willing to avail themselves of the accommodation provided for them, the evidence, I think, establishes, in a sufficiently clear manner, that from the testator's death in January 1807 down to the present time no Maharaj has in fact resided there. There is evidence, which I see no reason for disbelieving, that Rajkuver in her life-time sent invitations to Maharajas to come and live there, but that they would not come. According to the evidence of one witness, Vandravan Dayalbhái, a nephew of Rajkuver, he was sent on one occasion to invite two Maharajas, Krishnaraiji Maharaj and Gokal Ushowji Maharaj, who were on a visit to Bombay, to come and reside in the house, and they returned the polite answer, "the house is in Bora Bazaar, and many Parsis live there, the place stinks, and we will not come." It is very probable, as accounting for the reluctance of the Maharajas to live in this neighbourhood though the testator, who may be supposed to have known then usages, had expected that they would do so, that this neighbourhood has, since the testator made his will in 1802, become more and more inhabited by Parsis, and now it seems to be almost exclusively so inhabited. The undisputed facts that no Maharaj has ever resided in the place, and that since Rajkuver's death in 1870, when, even according to the plaintiff's evidence, the provisions of Bhugwan Kulla's will in their favour must have become known, there is no trace of any attempt by or on behalf of any Maharaj to enforce the provisions of the will in this respect, go far, in my opinion, to support the evidence that it would be contrary to their usages and feelings to live in such a neighbourhood. Then, in addition to the fact, which is, I think, fairly established, that the object to

out, by reason of the unwillingness of the Maharajas to resort to the place, there is the fact that in 1862 the house itself, though still, to some extent at least inhabitable, for the defendant says that when he bought it a Pársi cooper lived on the ground-floor, was in a decayed and dilapidated state. The defendant, who, I may mention, gave his evidence in a very straightforward manner, and seemed to me an honest and respectable man, states that Rajkuver had mentioned to him, as one of the reasons for being obliged to sell the house, that it was in a ruinous state, and that she had received a notice in respect of that house, meaning, it may be surmised, a notice from the Municipal Commissioner that the house was in an insecure or objectionable state. He says farther that, after completing the purchase, he almost entirely pulled down the old house of one storey and a loft, and re-built it in the form of a house with four storeys and a loft, and expended between Rs. 15,000 and Rs. 16,000 in such alterations and re-building. He states that Rajkuver told him the house had belonged to her husband, and had been set apart as charity as a place for the Maharajas to put up in, but that, as it was in a Pársi quarter, the Maharajas would not live there, that she told him further that the house was in a ruinous condition, and that she had received a notice in respect of it, and that she was obliged to sell it. He states further that she told him that she had no intention to appropriate the purchase money, but would apply it to charitable purposes, to build a temple at Gogo. The defendant himself seems to have felt a difficulty on hearing that the property was charity property, but was satisfied, or, as he expressed himself, "was glad" when Rajkuver stated that she had a "power" from the Court. Having arranged about the bargain, the defendant went to a solicitor of this Court, of respectability and experience, and asked him to manage the completion of the purchase, telling him to make inquiries as to creditors or claims against the property and as to the vendor. The defendant, though a man of fair intelligence, says that he cannot read or write. The defendant says that he told his solicitor that the property was a charity property. By the exhibits (Nos. 5, 6, and 7) it appears that notice of the intention of the defendant to purchase the property, and calling upon persons having claims on the property to come forward, was advertised in the native news-

1876

MANIKLÁL
AIMARÁM
v.
MANCHERSHI
DINSHA
COACHMAN.

1876.
 MA'NIKLA'L
 ATMA'RAM
 v.
 MANCHFRSHI
 DINSHA
 COACHMAN.

paper the *Samachar Durpan* on 23rd June 1862, and in the *Times of India* on 4th July 1862, and that *battaki* was beaten on the same day, 4th July 1862. The defendant states that his solicitor gave him no caution against accepting the property. The solicitor himself could not be examined, as he had left Bombay for some years past without intention of returning. Now in these circumstances, of anything like actual *mala fides* on the part of the defendant there can, I think, be found no trace. He buys the property openly, publishing his intention to do so, calling upon persons who had any claims upon it to set them up, he consults a solicitor, and acts under his advice, gives a price for the property which it is not suggested was not an adequate one, and proceeds to expend Rs. 15,000 or Rs. 16,000 in re-building and improving the property. True, he had notice that the vendor was a trustee of the property for a charity, but he also was informed by her, and, as it appears, in accordance with the fact, that the objects of the charity would not avail themselves of it, and he was also informed, and again in accordance with the fact, that the property was in a decayed and dilapidated condition, and this was alleged by the vendor as a ground for the necessity of selling it. He was also informed, as he states, by Rajkuver, that she had no intention to appropriate the purchase money to her own purposes, but intended to apply it in charitable purposes, namely, the building of a temple at Gogo. As to this point, I may mention, that though the application of the purchase money received from the defendant cannot be traced as having been expended in such a manner, yet the evidence sufficiently establishes that in and after the latter part of the month of September 1862 Rajkuver did expend Rs. 15,000 or Rs. 16,000 in completing a temple and *dharmasala* at Gogo. I do not mean to express any opinion whether this on Rajkuver's part was, or was not, a proper application of the purchase money received from the defendant, but the fact of the representation by her to the defendant of her intention to apply the money for charity is very material with reference to the question of his *bona fides*. It is also to be observed that in 1862 very different notions prevailed amongst professional men, or most of them, in Bombay, with reference to the powers of a Hindu executor who had obtained

ble property belonging to the testator, to the notions which may be said to prevail now with respect to such powers, independently, at least, of Acts X of 1865 and XXI of 1870. This change has been, so far as I can trace it, due to the question having been more accurately investigated, and to attention having been paid to certain Calcutta decisions passed in comparatively recent times. An erroneous idea of the law prevailing among the profession for the time being cannot, of course, alter the law, but the fact of the prevalence of such erroneous ideas is surely very material as bearing on the *bonâ fides* of a purchaser who may have acted on the advice of members of such profession.

For the foregoing reasons I have arrived at the conclusion that the defendant is entitled to rely on the Limitation Act, as being a purchaser, not only for value, but *bonâ fide*, within the meaning of Article 134 of Schedule 2 and of Section 10 of the Indian Limitation Act IX. of 1871.

There is another question worthy of consideration, and that is, whether the sale of the property by Rajkuver (I say nothing of the application by her of the purchase money) was, in the circumstances of the case, a breach of trust at all. There is no such principle of law that the alienation of charity property by the trustees is, standing by itself, a breach of trust. The Court of Chancery in many cases authorizes such alienations, and according to Lord Langdale's judgment in *Attorney General v. South Sea Company*⁽¹⁾ "that which the Court might have done upon its own consideration of what would have been beneficial to the charity, might have been done by the trustees upon their own authority in the exercise of their legal powers." Looking at the circumstances of the present case, and having regard to the principles to be found in a number of decisions of English Courts of Equity, (of which I may mention *Attorney General v. Warner*⁽²⁾, *Attorney General v. Pembroke Hall*⁽³⁾, *Attorney General v. Hungerford*⁽⁴⁾, and *Attorney General v. The South Sea Company*⁽⁵⁾), I should have been inclined, had it been necessary in the present case distinctly to decide the question, to uphold the sale by Rajkuver as being a proper and reasonable exercise of her office as trustee,

1876.

MANIKLAL
APURAM
v
MANGIRSHI
DINSHI
COACHMAN.

(1) 4 Beav. 453. See p. 458. (2) 2 Swanst. 291.

(3) 2 Sim. & St. 441. S. C. 1 R. & M. 751. (4) 2 Cl. & Fin. 357. (5) 4 Beav. 453.

1876.
MA'NIKE'L
ATMARA'M
v
MANGHI PSHI
DINSHI'
COACHMAN,

and to have held it not to have been a breach of trust at all. But I say nothing as to the question whether her application of the proceeds to building or completing a temple and *dharmshala* at Gogo, (a purpose in which the objects of the charitable intentions of Bhugwan Kulla, as declared in his will, do not appear to have any interest, and from which they do not appear to derive any benefit), can be sustained. But in my opinion the proper person to institute any suit against the estate of Rajkuer, if any suit at all be maintainable, in respect of her application of the purchase money received from the defendant, would be the Advocate General on behalf of the Maharajas, and not the present plaintiff.

I may add, that, in my opinion, there is nothing in the Indian Limitation Act excluding from its benefit those asserting their right to claim under a *bonâ fide* purchase for value, by reason that those claiming against them are the objects of a *charitable* trust imposed on such property. It has been decided by the highest tribunal in England, in the case of the *President and Scholars of the College of St. Mary Magdalen, Oxford v The Attorney General*⁽¹⁾, that the purchasers for value of lands devoted to charity, namely, the poor of certain parishes, were entitled to rely on the English Statute of Limitations as a defence, though they purchased with notice of the charity. I can see no reason for any different conclusion with regard to the Indian Limitation Act

The result, therefore, is that the 1st and 7th issues must be found for the defendant, and the suit be dismissed with costs

[APPELLATE CIVIL JURISDICTION.]

Special Appeal No 327 of 1875

SITA'RA'M VA'SUDEV (DEFENDANT AND APPELLANT) v. KHANDERA'V
BALKRISHNA (PLAINTIFF AND RESPONDENT).

Prescriptive right—Regulation V of 1827, Section 1, Clause 1—Limitation—Act XIV. of 1859, Section 1, and Clause 13—Act IX of 1871, Section 2, Schedule I., and Schedule II., Article 127.

In 1873, the plaintiff sued for his share in certain ancestral property in the possession of the defendant, and alleged that the latter had been united with him in estate. He, however, admitted that he had lived separate from the defendant for

forty years previously to the institution of the suit, and that he had not, during that period, received any portion of the profits of the ancestral property. The defendant pleaded limitation. Both the Lower Courts held that the suit was governed by Act IX of 1871, Sch. II, Art. 127, and decreed in favour of the plaintiff, on the ground that no demand by the plaintiff of his share and refusal to comply therewith had been proved.

Held by the High Court in Special Appeal that the defendant had acquired under Regulation V. of 1827, Section 1, Clause 1, a prescriptive title in the immoveable estate sued for, by his uninterrupted possession as proprietor for more than thirty years before Act IX of 1871 came into force, and that, therefore, the plaintiff's claim was barred, the effect of that Regulation being not only to bar the plaintiff's remedy but to take away his right.

The repeal of a statute or other legislative enactment cannot, without express words, or clear implication to that effect, in the repealing Act, take away a right acquired under the repealed statute or other enactment while it was in force.

And, accordingly, although Act IX of 1871, Section 2, Schedule I, expressly repealed Regulation V. of 1827, it did not affect any prescriptive right or title which had, under Section 1 of that Regulation, been acquired before Act IX. of 1871 was passed.

THIS was a special appeal from the decision of E. Hosking, Acting Assistant Judge at Tanna, affirming the decree of Naro Mahadeo, 2nd Class Subordinate Judge at Mahád.

The plaintiff sought to obtain a share in ancestral property in the possession of the defendant, whom the plaintiff alleged to be united with him in estate. The plaintiff, however, admitted that he had lived separate from the defendant for forty years before the institution of this suit, and had not during that time received any portion of the profits or produce of the ancestral estate.

The only point argued in this case, both in the Lower Appellate Court and in the High Court, was the question of limitation.

The special appeal was argued before WESTROPP, C. J., and MELVILL, J.

Mahadeo Chimnáji Apte for the special appellant.—Both the Lower Courts were wrong in holding that the case was governed by Act IX of 1871, Schedule II., Article 127. The plaint was filed on the 10th November 1873. The plaintiff admits in Exhibit No. 2 that he and the defendant have been living separately for forty years before the institution of the suit, and that he was not, during that time, in possession or enjoyment of any part of the family property in which he now claims a share. Regulation V. of 1827, Section 1, Clause 1, gave a prescriptive right to the party in uninterrupted

1876.

SRI KRISHN
VA'GUDLY

v.

KHANDERA'V
B'KRISHNA.

1876.

SITA'RAM
VASUDEV
vs.
KHANDERAV
BALAKRISHNA

ed possession for thirty years. The family property, therefore, became completely vested in the defendant by prescription under that Regulation by his forty years' possession as owner before Act IX. of 1871 came into force on the 1st April 1873. A Hindu coparcener under Section 1 of that Regulation was held to have acquired a complete prescriptive right to the undivided family property in his possession uninterruptedly for thirty years, held by him as proprietor *Gurávi v. Gurávi* ⁽¹⁾, *Ránc v. Ránc* ⁽²⁾. The prescriptive title given by Section 1 of the Regulation could not be taken away either by Act XIV. of 1859 or Act IX. of 1871, in the absence of any provision, either express or implied, to that effect. But neither of the Acts contains any such provision. Section 1 of the Regulation, as held by the Privy Council in *Maháráná Patesangji v. Desái Kalárányáji* ⁽³⁾, remained unaffected and unrepealed by Act XIV. of 1859. That section not only barred the remedy, but extinguished the right itself. Supposing the case was governed by Act XIV. of 1859, the plaintiff's claim was still barred. Adverse possession for more than twelve years under that Act both barred the remedy and extinguished the right in favour of the person in possession. *Raja Baradahlant Roy v. Prankkishna Purao* ⁽⁴⁾. Under that Act such adverse possession was of itself sufficient to create a title. *Ram Sahoy Singh v. Kooldeep Singh* ⁽⁵⁾, *Ameeroonissa Begum v. Amir Khan* ⁽⁶⁾, *Brinlabund Chunderion v. Tináchand Banerjee* ⁽⁷⁾. If a claim was once barred under Act XIV. of 1859, it could not be revived under the new Limitation Act IX. of 1871: *Vencatachella Mudali v. Sashagheriy Rau* ⁽⁸⁾, *Molakatalla Naganna v. Pedda Narappa* ⁽⁹⁾, *Eathamakala Subbammah v. Rajiah* ⁽¹⁰⁾, *Vencataramanier v. Manche Reddy* ⁽¹¹⁾. If a person suffers his right of action to be barred by limitation, the practical effect is the extinction of his title in favour of the party in possession for more than the period of limitation. *Gunga Gobind Mundul v. The Collector of the 24 Pergunnahs* ⁽¹²⁾.

⁽¹⁾ 3 Bom. H. C. Rep. 170 A. C. J.

⁽²⁾ *Ibid.* 173.

⁽³⁾ 10 Bom. H. C. Rep. 281, see p. 288; S. C. L. R. 1 Ind. Ap. 34, see p. 51.

⁽⁴⁾ 3 Beng. L. R. 343 (A. C.) S. C. 12 Calc. W. R. 192 Civ. Rul.

⁽⁵⁾ 15 Calc. W. R. 80, 82 Civ. Rul.

⁽⁶⁾ 17 Calc. W. R. 119 Civ. Rul.; S. C. 8 Beng. L. R. 540.

⁽⁷⁾ 20 Calc. W. R. 114 Civ. Rul.; S. C. 11 Beng. L. R. 237.

⁽⁸⁾ 7 Mad. H. C. Rep. 283.

⁽⁹⁾ *Ibid.* 288.

⁽¹⁰⁾ *Ibid.* 293.

⁽¹¹⁾ *Ibid.* 298.

Shántādm Nárāyan (with him the Honourable Ráo Sáheb V. N. Mandlik, Government Pleader) for the special respondent :— The suit was brought when Act IX. of 1871 was in force. That Act expressly repealed Regulation V. of 1827. The present case, therefore, does not come under that Regulation. At one time, Regulation V, Section 1, was not held applicable to partition suits between Hindus. The late Sadr Adalat, however, in subsequent cases, applied it to such suits by analogy, and presumed partition or separation in a case of thirty years' uninterrupted possession *Ráne v. Ráne*⁽¹⁾ So the Regulation was applied to a partition suit merely by legal fiction. Under Section 8 of that Regulation the defendant may be regarded as a managing coparcener, managing the family estate on behalf of the plaintiff, and as such was in the position of a trustee. His possession, therefore, will not affect the plaintiffs' right. The case cited from 7, Weekly Reporter P. C. 21 was one under Bengal Regulation II. of 1805, and not under Act XIV. of 1859. The same may be said with respect to the two other cases quoted from the 12th and 15th vols. of the Calcutta Weekly Reporter. There was no law of prescription in Bengal, so the High Court there created one out of Act XIV. of 1859.

1876

SITARAM
VASUDEV
v.
KHANDERÁV
BÁLKRISHNA.

The judgment of the Court was delivered by—

WESTROPP, C J :—This is a suit in which the plaintiff seeks to obtain a share in ancestral property in the possession of the defendant, whom the plaintiff alleges to be united with him in estate. The plaintiff admits that he has lived separate from the defendant for forty years previously to the institution of this suit in the year 1873, and that he (the plaintiff) has not, during that period, received any portion of the produce or profits of the ancestral property.

Reg. V. of 1827, Chap. I., Sec. 1, Cl. 1, enacted that “when- ever lands, houses, hereditary offices, or other immoveable property have been held without interruption for a longer period than thirty years, whether by any person as proprietor, or by him and his heirs, or others deriving a right from him, such pos-

⁽¹⁾ 3. Bom. H. C. Rep. A. C. J. 174 in notes; *Girdhur Purshotum v. Govind*. Harr. S. D. A. 371.

1876.

SITARAM
VASUDEV
v.
KHANDIRÁV
BALAKRISHNA.

session shall be received as proof of a sufficient right of property in the same."

That section has, both in the Sadr Adalat and in the High Court, been held applicable to suits, such as the present, to recover a share in undivided, immoveable estate belonging to a Hindu family *Gandhur Purshotam v. Govind Kasidas* ⁽¹⁾ *Gurávi v. Gurávi* ⁽²⁾, *Rám v. Rám* ⁽³⁾.

Of Sec. 1, Chap. I, Reg. V of 1827, Sir J. Colville, in giving the judgment of Her Majesty's Privy Council in *Maharájá Fatesangji v. Desái Kalishráj* ⁽⁴⁾, says that it is "an enactment which, inasmuch as it relates only to the acquisition of a title by positive prescription, seems to be unaffected by Act XIV. of 1859 and to stand unrepealed in the Presidency of Bombay." In saying that it was unrepealed in the Presidency of Bombay, their Lordships, who gave their judgment in 1873, only meant, as the context shows, that it was not repealed by Act XIV. of 1859. It was expressly repealed by Act IX. of 1871, Sec. 2 and Sch. I.

Act XIV. of 1859, Sec. 1, Cl. 13, also applied to such suits as the present, but the whole of that Act, except Sec. 15 (which has no bearing on the present case), has been repealed by Act IX. of 1871, Sec. 2, Sch. I. The Courts below have held that this suit is governed by Sch. II., Art. 127 of that repealing Act, and that, as no demand by the plaintiff of his share and refusal to comply with such claim had been proved, his suit is not barred by that Act.

But the defendant had, in our opinion, acquired a prescriptive title in the immoveable estate, the subject of this suit, by his uninterrupted possession as proprietor for more than thirty years previously to the passing or coming into force of Act IX. of 1871. Any Court in which his title was agitated, whether in a suit brought by himself, or by the plaintiff, would have been bound, on satisfactory and conclusive evidence of the defendant's uninterrupted possession as proprietor for more than thirty years, to have received such evidence as proof of a sufficient right of property in the immoveable estate. In short, the effect of Reg. V. of 1827, Chap. I., Sec. 1, was not merely to bar the present plaintiff's remedy, but to take away his right.

The repeal of a statute or other legislative enactment cannot, without express words, or clear implication to that effect, in the repealing Act, take away a right acquired under the repealed statute or other enactment while it was in force; *Restall v. London and South Western Railway Co.* ⁽¹⁾, *Oldrege v. Puckridge* ⁽²⁾.

1876.
SIVARAM
VARMA
v.
KHANDIRAY
BALKRISHNA.

With reference to the Bengal Regulations of Limitation [III. of 1793, Sec. 14, and II. of 1805, Sec. 3,] in relation to immoveable property in the Mofussil, there are some important remarks of Sir Lawrence Peel, C J., and Sir James Colvile in their valuable judgments in *Sibchunder Doss v. Sibkissen Bonnerjee* ⁽³⁾. The question there was whether the *lex fori* of the Supreme Court, viz., the Stat. 21, Jac. I., which required an adverse possession of twenty years, or the *lex loci rei sitæ*, viz., the Regulations above mentioned, which prescribed a twelve-years' limit, should be applied to an action of ejectment, brought in the Supreme Court of Calcutta, to recover some lands at Tittaghur in the Mofussil. The Court held the latter to be applicable, and, accordingly, that the lessor of the plaintiff must fail, as he was unable to prove that his right of entry had accrued within twelve years. If the right of entry ever existed, it had accrued twenty years, less four days, before the filing of the plaint, and, therefore, would have been within the statute of James. Sir L. Peel said, at page 76 :—" In my opinion, the weight of authority is in favour of the position, that though a law in terms limits *the suit* only as to immoveable property, it in effect gives the possessor, who is protected against out-standing claims founded on original right, the property as against those persons as well as the possession. It is undoubtedly the law in all the Courts in the Mofussil, and has long been so, that, after twelve years' adverse possession, no exception applying to the case, and when all claimants are barred in those courts as to suits, the occupant has title, and may confer title;" and again, at p. 77, "but in the case of these Regulations" (the Bengal Regulations above mentioned) "the construction which has prevailed in the Mofussil, viz., that adverse possession for the prescribed period not merely bars the remedy, but gives title, is in harmony with the presumable will of their framers, with the opinion of the most able jurists on laws as to real estate,

⁽¹⁾ L. R. 3 Exch. 141.

⁽²⁾ *Ibid.* 145.

⁽³⁾ 1 Bouvier 70.

1876.

SITA'RA'M
V'ASUDLV
v.
KHANDERÁV
BÁ'LEKRISHNA.

similarly worded, and with the whole course of decisions on analogous branches of the English law," and again, at p 78, "There may be found in the writings of Lord Coke, in reference to this subject, passages to the effect that the mere right subsists still, and that a 'right' can never be lost unless released or surrendered. But Lord Coke, if these observations were read generally and without limitation, would be putting forth rather a sort of moral or metaphysical abstraction, not founded on any clear notions of the origin and foundation of the right of property, than a legal rule of property. This legal view of the subject will be learned on reference to what he says as to the doctrine of remitter. There was no remitter to a bare title, nor to a right for which the party had no remedy by any action at all. The doctrine is thus laid down in Co. Lit. 349 a—"Here it is to be understood that regularly a man shall not be remitted to a right remediless, for which he can have no action, for Littleton here saith," &c. &c. It was always an established maxim in the law that a disseisor acquired *the fee*, that is to say, there might be a *tortious fee*, and consequently *property*, even as against the rightful owner, founded on wrong, and in the dispossessed person property was turned to a right. In this respect there was an important difference between the disseisin of lands and the wrongful taking of goods under an unfounded claim as owner. When all rights of action and entry as to lands in all other persons were barred by efflux of time, the legal title of the disseisor, or of those claiming under him, was complete, perfect, and indefeasible," and subsequently he adds, at page 81, "But if the disseisor or any one under him was put out of possession, or the lands were so left as to be subject to occupancy, general or special, and the rightful owner entered where his entry was conceivable, *i.e.*, allowable, and whilst any remedy by action remained to him, then by the doctrine of remitter, which only took effect on an entry with lawful title to enter, the tenant was in of his original title, which was superior to that of the demandant. At no time in our law could a tortious entry be made the foundation of a remitter, or be available to revive 'a right' which once existed, but against which effluxion of time had set up a bar in favour of long possession." Sir James Colville, speaking of the two Regulations

already mentioned, said at page 93 :—“ The wording undoubtedly shows that the law of limitation is one which in terms goes to the remedy rather than the right ; and as the law applies to all subjects, if the subject here were an obligation arising out of a contract, the wording of the law would be an irresistible argument against its application to this *forum*. But the subject of the suit is immoveable property, and the necessary effect of the law, which takes away the remedy in that locality, is to give a title in that locality to the adverse possessor.”

While the Bombay Regulation named a longer period of limitation than that in the Bengal Regulations, it used distinct language to indicate that when that period had expired, the right of property should be regarded as vested in the person who had enjoyed uninterrupted possession during the thirty years, and accordingly the Privy Council, as we have seen, did not hesitate to describe Bombay Regulation V. of 1827, Section 1, as an enactment of positive prescription. It, too, was specially conversant of immoveable estate, while Bengal Regulation III. of 1793, Section 14, was applicable to all suits. Bengal Regulation II. of 1805, Section 3, applied to immoveable property only, but was not quite so express as to the transfer of the right of property as the Bombay Regulation. However, the mention of “ a prescriptive right of property ” in the 4th clause of section 3 of Bengal Regulation II. of 1805, when taken in conjunction with the other clauses in that section and with the enactment of 1793, does lead to the inference that such a transfer was worked by the adverse possession for the prescribed period of twelve years.

In the Privy Council case, already mentioned ⁽¹⁾, and to which the law of limitation applicable was that of those same Regulations, Lord Romilly said :—“ It is of the utmost consequence in India that the security which long possession affords should not be weakened. Disputes are constantly arising about boundaries and about the identity of lands. Contiguous owners are apt to charge one another with encroachments. If twelve years’ peaceable and uninterrupted possession of lands, alleged

1876.

SITARAM
VASUDEV
v.
KHANDERAV
BALAKRISHNA.

(1) *Gunga Govind v The Collector of the 24 Pergunnahs*, 11 Moore Ind. Ap. 345 ; S. C 7 Cal. W. R. 21 P. C.

1876.

SITARAM
VÁSUDDEV
v.
KHANDERÁV
BÁLKRIISHNA.

to have been enjoyed by encroachment on the adjoining lands, can be proved, a purchaser may take that title in safety."

It is not clear from the reports of *Raja Barakant Roy v. Prankkishna Paroi* ⁽¹⁾ whether those Regulations or Act XIV. of 1859, Sec. 1, Cl. 12, was the law applied. The same remark applies to *Ram Sahoy Singh v. Kooldeep Singh* ⁽²⁾. In *Ameer-oonissa Begum v. Anil Khan* ⁽³⁾ twelve years' adverse possession under Act XIV. of 1859, Sec. 1, Cl. 12, was held not only to bar the remedy, but so to transfer the right as to enable the party, who had such possession, but was subsequently ousted successfully to maintain a suit to recover possession. The case of *Grindaban Chander Roy v. Tarachand Bundepallhya* ⁽⁴⁾ was decided in the same way and upon the same Act.

Purchasers have been compelled to accept a title depending upon the Statute of Limitations (3 and 4 Wm. IV., C. 27), which not only bars the remedy, but takes away the right and title of the person whose remedy is barred: *Scott v. Nizon* ⁽⁵⁾; Sugden's Vendors and Purchasers, pp. 389, 475, 476, Ed. of 1862; 1 Dart Vendors and Purchasers, 369, 4th Ed. We think that Reg. V. of 1827, Chap. I., Sec. 1, though not in terms so express as the English statute, but more distinct than the Bengal Regulations, has the same effect of barring the right as well as the remedy.

No doubt, as Lord Tenterden said in *Surtees v. Ellison* ⁽⁶⁾, "it has been long established, that when an Act of Parliament is repealed, it must be considered (except as to transactions past and closed) as if it never existed;" but we consider that a title, acquired under an enactment of positive prescription such as Reg. V. of 1827 before it was repealed, is a transaction past and closed, and fully comes within Lord Tenterden's exception. Being of opinion that Act IX. of 1871, although it repealed Reg. V. of 1827, did not affect any prescriptive right or title which had under Chap. I., Sec. 1 of that Regulation, been acquired by any

(1) 3 Beng. L. R. 343 A. C.; S. C. 12 Calc. W. R. 192 Civ. Rul.

(2) 15 Calc. W. R. 80, 82 Civ. Rul.

(3) 17 Calc. W. R. 119 Civ. Rul.; S. C. 8 Beng. L. R. 540.

(4) 11 Beng. L. R. 237; S. C. 20 Calc. W. R. 114.

(5) 3 Dr. & War. 338; S. C. 2 Con. & L. 185; Ir. Eq. R. 8.

possessor of immoveable property before Act IX. of 1871 was passed, inasmuch as neither by express words nor by clear implication does there appear to have been any intention on the part of the Legislature to take away any such right or title, it is unnecessary for us to consider this case with reference to Act XIV. of 1859, or to pronounce any opinion upon the cases which have been cited for the appellant as to that Act.

We must reverse the decrees of the Courts below, and make a decree for the defendant (appellant), with costs of the suit and of both appeals.

[APPELLATE CIVIL JURISDICTION.]

Special Appeal No. 135 of 1876.

ABDUL KARIM (PLAINTIFF AND APPELLANT) v. MANJI HANSRAJ AND OTHERS (DEFENDANTS AND RESPONDENTS).

1876.

August 7.

Limitation—Act XIV. of 1859—Act IX. of 1871, Section 22 and Schedule II., Article 60—Evidence—Onus probandi—Proof of payment—Misjoinder.

On 2nd August 1872, A. K. filed a plaint against M. H. and M. R., in which he alleged that on 1st April 1870 M. R. had given a *hundi* for Rs. 500, for value received, to A. K.; that on 27th March 1871 M. H. purchased this *hundi* from A. K., promising to pay him Rs. 534 for it; that M. H. gave the *hundi* to his brother I. H., for the purpose of obtaining payment of the amount from M. R., and that I. H. subsequently informed A. K. that the *hundi* had been lost. A. K. accordingly prayed that the defendants M. H. and M. R. might be decreed to pay to him Rs. 534 with profit and interest. M. H. denied that he had purchased the *hundi* from A. K., who, he alleged, had given the *hundi* to I. H. for the purpose of getting it cashed. M. R. admitted that he had executed the *hundi*, and had given it to A. K. for Rs. 500. He further alleged that it had been presented to him for payment by I. H., to whom he had paid the amount with interest on 31st March 1871, and he produced the *hundi* with a receipt, purporting to be by I. H., indorsed on it. The trying Judge, after settlement of the issues, on 25th June 1874, added I. H., as a party defendant. I. H. alleged that A. K. had given him the *hundi* for the purpose of getting it cashed, denied the payment by M. R., alleged the indorsement on the *hundi* to be a forgery, and pleaded limitation.

Held that the admission by M. R. of the drawing of the *hundi* for value received, laid on him the burden of proving payment, and that, though the possession by M. R. of the *hundi* was a circumstance in his favour, yet, as it did not in itself amount to proof of payment, the *onus probandi* was not thereby shifted to the plaintiff.

1876

ABDUL
KARIM
v
MANJI
HANSRAJ
AND OTHERS.

Held also, with reference to Section 22 of Act IX of 1871, that the law of limitation applicable to the suit, so far as I. H. was concerned, was Schedule II., Article 60 of that Act, and that, therefore, if the payment by M. R. to I. H. were not proved to have been made within three years before 25th June 1874, the day on which I. H. was added as a defendant, the suit against him was barred.

Dayal Jany v. Khatar Ladda (12 Bom. H. C. Rep. 97) and *Uma Am. Iyengar v. Gopalachari* (7 Mad. H. C. Rep. 32) dissented from

Quære—whether suits barred under Act XIV of 1859 before Act IX of 1871 came into force, could, by reason of the alteration of the periods of limitation in the latter enactment, be now sustained.

THIS was a special appeal from the decision of A. D. Pollen, Acting Assistant Judge at Ratnagiri, reversing the decree of T. Taylor, 1st Class Subordinate Judge at the same place.

Abdul Karim brought this suit against (1) Manji Hansraj and (2) Muhammad Raisi, and alleged that on the 1st April 1870 he took a *hundi* for Rs. 500 from the second defendant and paid him the money, that, on the 27th March 1871, Manji (the first defendant) purchased the *hundi* from the plaintiff, and promised to pay him Rs. 534 and profit; that Manji gave the *hundi* to his brother Ibrahim for the purpose of realizing it from Muhammad (the second defendant) at Karwar; and that Ibrahim informed the plaintiff that the *hundi* had been lost, the plaintiff, therefore, sued to recover the sum of Rs. 534 with profit and interest. The plaint was filed on the 2nd August 1872. Manji (the first defendant) denied the purchase of the *hundi* from the plaintiff, and said that it had been given by the plaintiff to Ibrahim for the purpose of cashing it, and paying the amount to the plaintiff. Muhammad (the second defendant) answered that he had given the *hundi* to the plaintiff on receiving the value thereof, that it had been presented to him, for payment, by Ibrahim, to whom he paid the money, including interest, on the 31st March 1871, and that he had the *hundi*, with the receipt of payment by Ibrahim indorsed thereon. After the settlement of issues, the Subordinate Judge, Mr. Chintaman Sakharan Chitnis, under Section 73 of Act VIII. of 1859 on 25th June 1874, made Ibrahim Hansraj a co-defendant in the suit. No objection was made to this either by Ibrahim himself or by either of the other defendants. The new defendant answered that the plaintiff had given him the *hundi*, and request-

ed him to cash it, and to pay him the money, if recovered. He denied that Muhammad (the second defendant) paid him the amount of the *hundi*, and charged the indorsement of payment on it to be a fabrication. He also pleaded limitation. The Subordinate Judge then amended the issues, one of which raised the question of limitation as against Ibráhim (the third defendant), and on taking evidence on them held that Manji and Ibráhim (the first and third defendants) were liable for the amount claimed by the plaintiff, and that the suit was not barred against Ibráhim (the third defendant). The Subordinate Judge, accordingly, made a decree for the plaintiff for Rs. 534, but dismissed his claim for interest and profit. Against this decision both the plaintiff and the first and third defendants appealed. The Assistant Judge in appeal remanded the case to the Court of first instance to determine whether Manji (the first defendant) received the amount of the *hundi* through his brother Ibráhim (the third defendant). On remand Mr. T. Taylor (who had in the meantime succeeded Mr. Chintáman Sakharám Chitnis) found that the amount of the *hundi* was not recovered by Manji (the first defendant) through his brother Ibráhim (the third defendant), and expressed his opinion that Muhammad (the second defendant) had obtained possession of the *hundi* from Ibráhim (the third defendant) by some foul means; and that the receipt by Ibráhim (the third defendant) indorsed on the *hundi* had been fabricated. On the return of the proceedings the Assistant Judge held that the plaintiff did not give the *hundi* to Manji (the first defendant) on the understanding that he—Manji—was personally liable for the amount of it to the plaintiff; that the claim was barred against Ibráhim (the third defendant) under Act IX. of 1871, Section 22, that the plaintiff could claim nothing from Muhammad (the second defendant), because he—Muhammad—produced the *hundi* with satisfaction indorsed on it, and the plaintiff had failed to prove, as he was bound to do, that Muhammad (the second defendant) had obtained the *hundi* by theft, or that he had forged the indorsement thereon. The Assistant Judge, accordingly, reversed the decree of the first Court, and rejected the plaintiff's claim, as against all the three defendants. He seemed to think that there was a mis-joinder of the defendants in the case, and that the possession of the *hundi* by Muhammad (the second defend-

1876.
 ABDUL
 KARIM
 v.
 MANJI
 HANSRAJ
 AND OTHERS.

1876.

ABDUL
KALIM
v.
MANJI
HANSRAJ
AND OTHERS.

ant) with the indorsement of satisfaction thereon was a suspicious circumstance

The special appeal was argued before WESTROPP, C.J., and NA'NA'LHA'I HARIDA'S, J.

Pandurang Balibhadra for the appellant —The Assistant Judge was wrong in placing upon the plaintiff the burden of proving that Muhammad (the second defendant) had obtained the *hundi* by theft, and that he had forged the indorsement on it. Muhammad has distinctly admitted that he gave the *hundi* to the plaintiff on receipt of the value; and that when it was presented to him by Ibrahim he paid the money and got the *hundi* back with the receipt indorsed on it by Ibrahim. After these admissions he was bound to prove the alleged payment and the *bonâ fide* receipt of the *hundi* from Ibrahim. The point of limitation raised in the present case is similar to that decided by Bayley and Green. JJ, on the Original Side of this Court in *Dayál Jairáj v. Khatai Ladha* (1). No objection was taken to the joinder of all the defendants in the present suit, and one or other of them being liable to pay the amount of the *hundi* to the plaintiff, the Assistant Judge ought to have ascertained which of them was to pay.

Shivshunkar Govindram, for the first and third respondents, relied upon Section 22 of Act IX of 1871, and contended that, as expressly provided therein, the suit must be regarded as having commenced against Ibrahim (the third defendant) on the 23rd June 1874.

WESTROPP, C.J. —The Assistant Judge having found, as a fact, that the first defendant Manji did not receive the *hundi* from the plaintiff, or undertake the collection of its proceeds for him, this Court is bound by that finding, and must, so far as the decree of the Assistant Judge relates to the liability of the first defendant, affirm the same with costs.

As the second defendant Muhammad Raisi has not, nor has either of the other defendants, made any objection in the Courts below on the ground that he (Muhammad Raisi) ought not to have been joined as a co-defendant with the first and third defend-

ants, we must consider this case on its merits as against him. He admitted that in consideration of Rs. 500 received by him from the plaintiff, he (Muhammad Raisi) drew the *hundi*; hence it became necessary for him to discharge himself from the liability consequent upon that act. He attempted to do so by pleading payment of it to the third defendant, Ibráhim Hansráj. That defence subjected the second defendant (Muhammad Raisi) to the task of proving that he did pay to Ibráhim Hansráj the amount due upon the *hundi*. No burden whatever properly lay upon the plaintiff, the whole weight of proof of payment, and consequently of the genuineness of the receipt, was imposed by law upon the second defendant, who alleged the payment, and relied upon the receipt which he had produced. Yet the Assistant Judge has most distinctly shifted the *onus* to the plaintiff's shoulders, and has required him to prove that the receipt indorsed on the *hundi* was a forgery, and that the second defendant was guilty of theft. No doubt, the possession of the *hundi* by the second defendant was a circumstance in his favour, but that circumstance did not in itself amount to proof of payment, nor absolve him from the necessity of proving that he paid the amount of the *hundi* to the third defendant. We must, therefore, reverse the decree of the Assistant Judge in so far as it affects the second defendant Muhammad Raisi, and remand the cause for a new trial on the merits. Costs throughout, as between the plaintiff and that defendant, must abide the result of the new trial.

If the second defendant fail to prove payment of the *hundi* to the third defendant, the suit will not be sustainable against the third defendant, and there must be a decree in his favour with costs throughout to be paid to him by the plaintiff, but to be repaid to the plaintiff by the second defendant.

If, on the other hand, the second defendant prove that he did pay the amount of the *hundi* to the third defendant, then it will become necessary for the re-trying Court to determine when that payment was made. If it were not made within three years before the 25th day of June 1874, on which day the third defendant was added as a party to this suit, which was instituted against the first and second defendants on the 2nd of August 1872, we think

1876.

ABDUL
KARIM
v.
MANJI
HANSRAJ
AND OTHERS.

1876.
 ABDUL
 KARIM
 v
 MANJI
 HANSRAJ
 AND OTHERS.

that the suit must be regarded as barred against the third defendant by lapse of time, inasmuch as, in our opinion, the Law of Limitation applicable to it, so far as that defendant is concerned, is Act IX of 1871, Sch. II, Art. 60.

In opposition to this view, *Dayál Jainúj v. Khatáv Ladhá*⁽¹⁾ has been cited. There the suit had been instituted against Khatáv Ladhá before the first of April 1873 (when Act IX. of 1871 came into force), but subsequently to that day other defendants, alleged to be jointly liable with him, were made parties and the Appellate Court held that Act XIV. of 1859, Section 1, Clause 16, was applicable to them as well as to Khatáv Ladhá, and not Act IX. of 1871. Sir Charles Sargent, however, who had heard that cause in the first instance, was of opinion that the period of limitation provided by Act IX. of 1871 and not that provided by Act XIV of 1859, was applicable to the added defendants. In his opinion we, after consulting our brothers Melvill and Kimball, who hold the same view, concur. The Appellate Court there noticed, without, however, strongly relying on the distinction, the use of the words "instituted" and "commenced" in the 22nd Section of Act IX of 1871. We see between those words no distinction upon which it would be possible to build an argument. Reading that section with Section 1, Clause (a), and Section 4 of the same Act we think that when to a suit filed against A, before the 1st of April 1873, B. is made a co-defendant subsequently to that day, the suit must be regarded as both instituted and commenced against B subsequently to that day, and, therefore, that, under Section 4, the period of limitation applicable in such a case as the present, would be that prescribed in the second schedule to Act IX. of 1871, Art. 60, viz., three years before B. was made a party to the suit. We attach no importance to any argument *ab inconvenienti* resting upon the incongruity of applying different periods of limitation to persons jointly liable. That is an inconvenience occasioned solely by the plaintiff's own default in not bringing his suit in the first instance against all proper parties. The *argumentum ab inconvenienti*, although forcible in the law⁽²⁾, is only applicable in cases of doubt, and not where the legislation is clear⁽³⁾, as it appears to

us to be in the present instance. Further, we are of opinion, and so are our learned brethren, whom we have consulted, that, even if Section 22 of Act IX. of 1871 had never been passed, the period of limitation, which would have been applicable to the third defendant, would be art. 60 of Schedule II. of Act IX. of 1871, for the decisions upon Act XIV. of 1859 (which contained no provision similar to Section 22 of Act IX. of 1871), both in Calcutta and here, were to the effect that a suit would not be regarded as instituted or commenced (we care not which phrase be used) against a new defendant until the time at which he was made a party to it, and the effect of Sections 1 and 4 of Act IX. of 1871, combined with that pre-existing law, would be to render the period of limitation applicable to him that which might be prescribed in Schedule II. of that Act, if he were so made a defendant after the 1st of April 1873.

The case of *Chinnasami Iyengar v. Gopalacharry*⁽¹⁾ was a suit brought, after the 1st of April 1873, on a promissory note executed while Act XIV. of 1859 was in force, but not barred under that Act on the 1st April 1873 when Act IX. of 1871 came into force, and it was there held that the period of limitation ought to be computed as it would have been under Act XIV. of 1859, (although that Act is silent on the point) from the date of the note⁽²⁾, and not, as prescribed by Act IX. of 1871, Sch. II., Art. 72, from the time of demand. We have, however, already in *Rám-chandra v. Soma* (a recent reference from the Court of Small Causes at Ahmednagar)⁽³⁾ stated our reasons for being unable to concur in that decision.

It was in the Madras case said⁽⁴⁾ that "the new Act (IX. of 1871) differs from the old (Act XIV. of 1859) merely as to the period at which, for the purposes of prescription, the action is to be considered as born. It does not on this point differ in any way either as to the period of prescription itself, or as to the modes by which the period can be extended. A demand by the creditor

(1) 7 Mad. H. C. Rep. 392.

(2) See 2 Mad. H. C. Rep. 472, Byles on Bills 320 (8th edn.) 2 M. & W. 461, 3 Post. & Fin. 149, Cro. Eliz. 548, 12 Mod. 444, Irish T. R. 242, 5 Bom. H. C. R. 150 A. C. J.

(3) See note at end of this case.

(4) 7 Mad. H. C. Rep. 394.

can have no such effect. When it was made, the Statute (Act XIV. of 1859) was already operating upon an action born previously to the new law coming into force, and that law could not, and did not, destroy that action for the purposes of limitation. If the new Act had made a demand a mode of extending the period, the case would be different. It merely alters the time, as to notes executed after its enactment, from which the period is to be reckoned. The point of time had already been fixed by the law applicable to it, and this suit is clearly barred." There is not, however, any exception in Act IX. of 1871 of bills, notes, or other transactions on which the period of limitation had begun to run, but was not completed under other enactments. There is an exception of "suits instituted before the 1st day of April 1873," and two other exceptions not affecting such suits as the present, and, independently of the strong inference arising from those special exceptions that none others were intended, there is the express enactment in Section 4 that "subject to the provisions contained in Sections 5 to 26 inclusive," (none of which affects this case), "every suit instituted, &c., after the period of limitation, prescribed therefor by the second schedule hereto annexed, shall be dismissed, although limitation has not been set up as a defence;" and that enactment must be coupled with the circumstance (already noticed) that in order to give timely notice of the new law of limitation, although it received the Governor-General's assent on the 24th of March 1871, and came into force generally on the 1st July 1871, its operation as to suits, &c., was deferred until the 1st of April 1873. Such a provision for the suspension of the operation of a new statute indicates that, from the day to which its operation is deferred, the Legislature intended it should regulate the bringing of suits on causes of action which had accrued before that day: *Towler v. Chaterton*⁽¹⁾, *The Queen v. The Leeds and Bradford Railway Company*⁽²⁾, *Cornill v. Hudson*⁽³⁾, *Pardo v. Bingham*⁽⁴⁾. In the Madras case, no doubt, the effect of the alteration in the law made by Act IX. of 1871 was in favour of the creditor; but in the present case, having regard to the view taken in this Court, of implied contracts not specifically provided

(1) 6 Bing. 258, 261. (2) 18 Q. B. 343; S. C. 21 L. J. N. S. Mag. Ca. 195.

(3) 11 Q. B. 329. (4) 37 L. J. N. S. Q. B. 8. (5) 1 R. 404, 405.

for by Act XIV. of 1859 (*Umedchand Hukamchand v. Sha Bulá-kidás Lalchand*⁽¹⁾, *Náro Ganesb Dátár v. Muhammad Khán* (2), *Fathá Jetháji Váni v. Shivshankar Bháishankar*⁽³⁾, the alteration in the law is unfavourable to the creditor, whose claim being for money alleged to have been received to his use by the third defendant, *i.e.*, a claim upon an implied contract not specially provided for by Act XIV. of 1859, and, therefore, falling within the general Clause 16 of Section 1 of that Act, he (the creditor) would, under that clause, have had six years from the time at which the money was received, but under Act IX. of 1871 he has only three years from that event.

1876.

ABDUL
KARIM
v.
MANJI
HANERÁJ
AND OTHERS.

In the Madras case (*Chinnasami Iyengar v. Gopalacharya* (4)) the period of limitation, fixed by Act XIV. of 1859 for such a suit, not having elapsed before the 1st of April 1873, when Act IX. of 1871 came into force, the latter enactment, by extending the period of limitation, did not deprive the defendant of any right to treat the claim against him as barred. That case, therefore, differed in a most important point from three other cases reported in the same volume: *Venkatachella Mudali v. Sashagberry Rau* (5), *Molakatulla v. Peddu* (6), *Venuturamanier v. Manche Reddy* (7), in all of which the plaintiff's claims had become barred under Act XIV. of 1859 before the 1st of April 1873, and if Act IX. of 1871 had been held applicable to such a state of facts, the result would have been to give such an *ex post facto* construction to that enactment as would have taken away from each defendant a right already acquired under Act XIV. of 1859. But in the Madras case which we first mentioned (*Chinnasami Iyengar v. Gopalacharya* (8)), not only had the right to treat the claim as barred not been acquired under Act XIV. of 1859 on the 1st of April 1873, but that Act stood unconditionally repealed upon that day by Act IX. of 1871. It is, indeed, in a certain sense, true, that when once time has commenced to run under a law of limitation, it cannot be stopped. But that rule is dependent on the continuance in force of the enactment under which time has been run-

(1) 5 Bom. H. C. Rep. 16 O. C. J. (2) 9 Bom. H. C. Rep. 280.

(3) Sp. Ap. 129 of 1875, decided 1st August 1876.

(4) 7 Mad. H. C. Rep. 392. (5) 7 Mad. H. C. Rep. 283. (6) *Ibid.* 288.

(7) *Ibid.* 298. (8) 7 Mad. H. C. Rep. 392.

1876.

ABDUL
KARIM
v.
MANJI
HANSRAJ
AND OTHERS.

ning. If the statutory pressure be removed by the total repeal of the Act, there is nothing to cause time to run against the creditor, unless the Legislature re-enact the old, or substitute some new, rule of limitation. This latter course, we think, it did adopt for such suits as that of *Chinnasami Iyengar v. Gopalaswamy* (1) by the 72nd Article of Schedule II. of Act IX. of 1871. We have said so much as to that case, because the principle of it seems to be that Act IX. of 1871 is not applicable to suits although instituted since the 1st of April 1873, if founded upon causes of action which accrued before that day; and if we had concurred in that principle, we should have been compelled to hold in this case that if the second defendant Mahomed Raisi made the payment alleged by him to the third defendant at any time within six years before the 25th day of June 1874, upon which day this suit was commenced against him by making him a party thereto, the plaintiff would not be barred from maintaining it. As, however, we think that Act IX. of 1871 is, from the 1st of April 1873, when it came into force, applicable to suits not then barred under previous enactments, we are bound to say that, unless it appear that the alleged payment were made by the second to the third defendant within three years before the 25th June 1874, the suit must be regarded as barred against the third defendant. If the re-trying Court be of opinion that the payment *was* made to the third defendant, but not within the three years just mentioned, there should be such order made by that Court with regard to the costs of this suit and of both appeals as to that Court shall, under such circumstances, seem just.

In *Sitaram Vasudev v. Khanderav Balkrishna* (2) it was held in this Court, within the last few days, that a suit instituted since the 1st of April 1873 for a share of immoveable property was barred, inasmuch as the defendant had uninterrupted and exclusive possession of that property for more than thirty years, as well before the commencement of the suit, as before the 1st of April 1873, and that Act IX. of 1871, Sch. II., Art. 127, was inapplicable to the suit. The reasons given were that before that Act came into force the defendant had, by the operation of Reg.

V. of 1827, Sec. 1, Cl. 1, acquired a right to the property, and that the Legislature had not, in Act IX. of 1871, either by express words or direct implication, shown any intention of taking away that vested right, although it had repealed the Regulation. We regarded Reg. V. of 1827, Sec. 1, Cl. 1, as a prescriptive enactment.

1876.

ABDUL
KARIM
a.
MANT
HANSRAJ
AND OTHERS.

Whether a suit either as to moveable or immoveable property which had become barred under any of the provisions of Act XIV. of 1859 before Act IX. of 1871 came into force, could, by reason of the alteration of the periods of limitation in the latter enactment, be now sustained, is a point which we have not as yet had occasion to decide, and do not now give any opinion upon. The three Madras cases⁽¹⁾ already mentioned are adverse to the maintenance of such suit.

Note.—The case of *Ramchandra v Soma*, mentioned in the judgment reported above, was referred, for the opinion of the High Court, by C. M. Cussetji, Judge of the Court of Small Causes at Ahmednagar, under Act XI. of 1965, Sec. 22, with the following observations :—

“The bond on which the above suit is brought is dated the 31st July 1870, and is made payable on demand. The suit was filed on the 25th January 1876.

“Following the analogous case of *Jeannis-a Begam v. Māncilji Karsetji*⁽²⁾ and the case of *Hempannal v. Hanuman*⁽³⁾, I consider that the period of limitation on the said bond began to run from the date of the bond, and that as the bond was executed before the passing of Act IX. of 1871, Article 58, Schedule II. of the said Act does not apply to it.

“I am accordingly of opinion that the plaintiff's suit is barred, as not having been brought within three years from the date of the bond sued on.

“In arriving at the above conclusion I have followed the cases recently decided by the High Court of Madras: *Venkatatchella Mudali v Sashugherry Rau* ⁽⁴⁾, *Mola kattalla v. Peida Narappa* ⁽⁵⁾, *Venkataraman v. Manche Reddy* ⁽⁶⁾, *Chinnasami Iyengar v. Gopalacharya* ⁽⁷⁾. These cases appear to me to be conclusive, and I should not have felt myself justified in referring this case, had it not been for a somewhat conflicting decision at page 487 of Vol. 10, Bombay High Court Reports,⁽⁸⁾ which leaves the matter in doubt.

(1) 7 Mad. H. C. Rep. 283, 288, & 298.

(2) 7 Bom. H. C. Rep. O. C. J. 36. (3) 2 Mad. H. C. Rep. 472.

(4) 7 Mad. H. C. Rep. 283. (5) *Id. Ib.* 288. (6) *Id. Ib.* 298.

(7) *Id. Ib.* 392. (8) *Madhavbhai Shirobhai v. Fettesing Nathubhai*.

1876.

ABDUL
KARIM
v.
MANJI
HANSRAJ
AND OTHERS,

"I have, therefore, the honour to submit, for the opinion of the Honourable the High Court, the question as under :—

"Whether a suit on a bond, payable on demand, but executed long previous to the passing of the present Limitation Act (IX. of 1871), brought more than three years after the date of such bond, is barred."

The reference was considered by WILKINSON, C.J., and NARAYAN CHANDRA, J., and the following was the judgment of the Court :—

The Judge of the Court of Small Causes at Ahmednagar has referred for the opinion of this Court the question whether a suit, instituted upon the 25th of January 1876, upon what he has described as a bond, but which not, as we understand, being under seal in the English manner, we prefer to call a promissory note, dated 31st July 1870 and payable on demand, is to be governed by Act IX. of 1871 or Act XIV. of 1859. The circumstance of chief importance to be noted is that the period of limitation, which under Act XIV. of 1859 commenced to run from the date of the note (1) had not expired upon the 1st day of April 1873, when Act IX. of 1871 came into force with respect to suits, &c., and from which day also Act XIV. of 1859 stood repealed (2).

The learned Judge has referred to 7 Mad. H. C. Rep., pp. 283, 288, and 298; but those three cases are not in point, as in all of them the right of suit had been barred by Act XIV. of 1859 before the 1st of April 1873, when Act IX. of 1871, Parts II. and III., came into force. The defendants in those cases had become entitled, under Act XIV. of 1859, to regard the claims sued upon as barred, and if the Court had held that Act IX. of 1871 had conferred upon the plaintiffs a fresh starting point, it would have given such a retrospective construction to Act IX. of 1871 as would have deprived the defendants of the right to treat the claims as barred—which construction, in the absence of express words or clear implication of a retrospective intent, Courts of Justice avoid—and the High Court of Madras declined in those three cases so to construe the Act. The point there involved does not present itself here, and, therefore, we limit our remarks to distinguishing these cases from the present case, and refrain from giving any opinion upon them. But we should add that *Madhuchhaji v. Pottising* (3) must not be regarded as opposed to these cases, inasmuch as, although the date in that case, when now even in A. C. 100, shows that the right of suit had been barred before Act IX. of 1871 came into force, that circumstance escaped the attention of the Court, and did not at all enter into its consideration when deciding the case. That case, too, was not argued, there not having been counsel or pleaders retained on either side.

Chinnasami Iyengar v. Chappabherga (4) is in point, but we are unable to concur in that decision. There, as here, the right of action had not been barred when

(1) 12 Mad. Rep. 414; Cro. Eliz. 548; Irish Term Rep. 242; 2 M. & W. 461; 3 P. & F. 149; 2 Mad. H. C. Rep. 472; 5 Bom. H. C. Rep. 160; Byles on Bills 320, 8th Ed.; 6 Beng. L. R. 292.

(2) By the effect of Sec. 1, Cl. a, Sec. 2, and Sch. II. of Act IX. of 1871 combined. (3) 12 Bom. H. C. Rep. 487. (4) 7 Mad. H. C. Rep. 392.

Act IX. of 1871 came into force on the 1st of April 1873; and although it is true that when once time begins to run under a law of limitation it does not stop, that rule must depend upon the continuance in force of the enactment under which time was running, and if, before the appointed period of limitation is accomplished, the enactment be repealed, there ceases to be any motive force to keep time running under the extinct ~~Act~~. Again, although in the particular case of notes and bills of exchange payable on demand, the alteration as to the time at which the period of limitation begins to run is favourable to the creditor, yet there are many instances in which the alteration is disadvantageous to him. For instance, according to the rulings of this Court (1), suits on implied contracts, not otherwise specifically provided for by Act XIV. of 1859, were held to fall within the general provision in Clause 16 of Section 1 of that Act, which prescribed the six years' limit, but for many of those (*ex.gr.* money paid for the debtor, money received for the creditor, money due upon an account stated) Act IX. of 1871 prescribes the three years' limit (2). If the claim be in existence before, but not barred when Act IX. of 1871 came into force as to suits (1st April 1873), time having then ceased to run under the repealed Act, we cannot perceive what law of limitation would be applicable to suits brought after that date upon such a cause of action, if it be not Act IX. of 1871. A careful perusal of that Act leads us to the conclusion that it was the intention of the Legislature that Act IX. of 1871 should apply to suits brought after it came into force, upon causes of action which existed before that day (1st April 1873), and on which causes of action the periods of limitation prescribed by Act XIV. of 1859 had not run their full course before that day. There is an exception in Act IX. of 1871, Section 1, Clause a, of suits instituted before the 1st of April 1873, but none of suits brought after that day upon causes of action not already barred by previous enactments, and which had accrued before that day—*Exceptio unius est exclusio alterius*. Section 4 expressly enacts that, "subject to the provisions contained in Sections 5 to 26 inclusive (none of which affects this cause), every suit instituted, &c., after the period of limitation prescribed therefor by the second schedule hereto annexed, shall be dismissed, although limitation has not been set up as a defence." The postponement of the operation of Act IX. of 1871, which received the Governor-General's assent on the 24th March 1871, to the 1st of April 1873, which postponement gave to creditors a period of more than two years within which they might bring their suits, upon the pre-existing enactments, and the repeal of these enactments, at the expiration of that period, are, we think, conclusive to show that thenceforth the law of limitation applicable to suits subsequently brought upon causes of action which had accrued previously to the day to which the operation of Act IX. of 1871 stood deferred, and which had not been barred under previous enactments, as well as to suits upon causes of action which accrue afterwards, is Act IX. of 1871. That such is the effect of deferring the operation of a statute is strongly exemplified in *Towler v. Chatterton* (3), where the postponement was much shorter than that in the case of Act IX. of 1871. As will be seen from the report of that case, the Court of Common Pleas there followed previous decisions to the same effect by Hullock, B., and Lord Tenterden, C.J., the parent of the statute. *Towler v. Chatterton* has itself been

1876.

ABDUL
KARIM
v.MANJI
HANSRAJ
AND OTHERS.

(1) 5 Bom. H. C. Rep. 16 O. C. J.; 9 Bom. H. C. Rep. 280; and many similar unreported cases.

(2) Sch. II., Art. 59, 60, 62.

(3) 6 Bing. 253.

1876 acted upon recently in *The Queen v. The Leeds and Bradford Railway Co.* (1) Coupling the postponement of the operation of Act IX. of 1871 with the circumstance already noticed, that the construction, which we propose to give it, does not take away any right which parties had acquired under previous enactment before Act IX. of 1871 came into force (2), we think that either Article 58 or 72 of the second schedule of that Act is applicable to this case. Both of these ~~articles~~ provide that, where the money is payable on demand the period of limitation of three years begins to run when the demand is made. This suit will, therefore, be unfounded, if there has not been a demand made more than three years before the filing of the plaint.

(1) 18 Q. B. 547, S. C. 21 L. J. N. S. Mag. Ch. 193.

(2) See the observations of Lord Huthley in *Parsons v. Bingham*, 1 R. & Cl. 715, explaining, *Moon v. Duden*, 2 Exch. 23, and *Judges v. Wootton*, 8 L. and B. 778, and see *Cornell v. Hudson*, 8 L. & B. 429, S. C. 27 L. J. N. S. Q. B. 8.

[APPELLATE CRIMINAL JURISDICTION.]

1876.
August 21.

REG. v. BHISTA BIN MADANNA

Act XXXI. of 1860, Section 32, Clause 6—Fine—Imprisonment—Partial fulfilment—Construction—Sentence.

Under Act XXXI. of 1860, Section 32, Clause 6, a sentence of fine only, or of imprisonment only, is a legal sentence.

A penal statute should, when its meaning is doubtful, be construed in the manner most favourable to the liberties of the subject, and this is more especially so when the penal enactment is of an exceptional character.

THE accused Bhista was tried by J. K. Spence, Magistrate, First Class, at Sirsi, in the District of Kanara, under Act XXXI. of 1860, and on the 28th July 1876 was sentenced to pay a fine of Rs. 5, under Section 32, Clause 6 of that Act, for having had in his possession a matchlock without a license. The Magistrate of the district (Mr. A. R. Macdonald) being of opinion that the sentence was illegal, because no imprisonment was awarded, referred the case for the consideration of the High Court.

The case first came before MELVILL and NA'NA'LHA'I HARIDA'S, JJ., and was by them referred to a Full Bench, the learned Judges being of opinion that certain previous decisions of the Court, which were in accordance with the opinion expressed by

was considered by a Full Bench, consisting of WESTROFF, C.J., 1876.
 MELVILL, KENDALL, and NA'NA'LHA'I HARIDA'S, JJ., on the 21st
 August 1876.

RE
 "BHOJA' IN
 MADRAS.

The judgment of the Full Court was delivered by

MELVILL, J :—The question referred for the decision of the Full Court is whether a sentence of fine only, or of imprisonment only, under Clause 6, Section 32 of Act XXXI. of 1860, is a legal sentence.

The clause in question enacts that every person who commits the offence thereby made punishable "shall be liable to be imprisoned, with or without hard labour, for a term not exceeding two years, and also to a fine not exceeding one thousand rupees." The ordinary meaning of this phraseology would certainly be that the offender may be punished with imprisonment, or fine, or both.

The difficulty of assigning to the words their natural interpretation arises from the circumstance that in other sections of the same Act (viz., 5, 15, 23, and 34) the Legislature has declared that persons who commit certain offences are "liable to fine, or imprisonment, or to both fine and imprisonment," and it may reasonably be argued that, if the Legislature had intended that offences under Section 32 should be punishable in the same way, it would have employed the same terms.

We admit the difficulty; but we think that there is, at least, an equal difficulty in putting upon the words quoted from Section 32 any other than their natural construction.

Only two other constructions are possible. The words may mean either that the offender (in the language of the Indian Penal Code) shall be punished with imprisonment, and shall also be liable to fine, or that the punishment must combine both imprisonment and fine.

The first of these constructions (which has been adopted in certain cases by a Division Bench of this Court) involves the anomaly of putting upon the word "liable" two widely different interpretations when applying it to the two branches of the same

1876. sentence. The law says (for the amplification of the section
 REG. does not alter its meaning), that the offender "shall be liable to
 BHISIA BEN imprisonment, and shall also be liable to fine." It seems to us
 MADANNA. contrary to all rules, grammatical and legal, to hold that these
 words mean that the offender *must* be punished with imprisonment,
 and *may* be punished with fine.

The second construction is equivalent to substituting the word
 "punished" for the word "liable." If this be done in one
 section, it must be done throughout the Act; and then we are
 immediately brought into collision with the same difficulty which
 met us at the outset, that is, the difficulty of supposing that the
 Legislature would use different terms, in different sections of the
 same Act, to denote precisely the same thing. For if "liable" is
 equivalent to "punished," then Section 2 of the Act, which says
 that an offender "shall be liable to a fine and to imprisonment,"
 means that he *must* be punished with both fine and imprison-
 ment; and this might just as well have been expressed by using
 the terms of Section 32, "shall be liable to imprisonment, and
 also to fine." It is impossible to escape from this difficulty
 except by concluding, either that the substitution of "punished"
 for "liable" does not furnish the true construction, or else by
 concluding that no argument can be founded upon a comparison
 of the phraseology used in different sections of the Act. Which-
 ever of these two conclusions we adopt, we are equally justified
 in putting upon the terms of Section 32 their ordinary natural
 construction.

The truth appears to us to be (and we cannot give a satis-
 factory judgment on the question referred to us without saying
 so), that Act XXXI. of 1860 has either been most carelessly
 drafted, or else different sections have been drafted by different
 hands, and no attempt has been made to bring them into harmony.
 The person who drafted Section 36 must, when he inserted the
 words "except as aforesaid," have supposed that there was some-
 thing in the preceding sections of the Act relating to the *venue*
 of offences. There is really nothing of the kind. The person
 who drafted Section 40 of the Act must have supposed that some
 offences under the Act are punishable with imprisonment only.
 No offence is so punishable. The person who drafted Sections

23 and 40 of the Act would (it may be supposed) have used the term "liable *upon conviction*" instead of the single word "liable" in other sections of the Act, and would not have left room for the suggestion (which, however absurd in itself, is logically sustainable, if there is anything in the argument drawn from incongruity of expressions) that offences other than those mentioned in Section 23 are punishable without any conviction at all. The difference between the words "liable to be imprisoned" in Section 32 and "liable to imprisonment" in the other sections of the Act, however trivial that difference may be, indicates that Section 32 was drafted by a different hand from that to which we are indebted for the other portions of the statute.

For these reasons we think that we ought not to attach much weight to the only argument which is adverse to the natural construction of Section 32, viz., the argument drawn from the use of a different phraseology, to express the same thing, in other sections of the Act. On the other hand we feel bound to construe a penal statute, when its language is ambiguous, in the manner most favourable to the liberties of the subject, and this is more especially so when the penal enactment is of an exceptional character. Our answer to the question referred to us will, therefore, be that a sentence of fine only, or of imprisonment only, under Clause 6, Section 32 of Act XXXI. of 1860, is a legal sentence.

[APPELLATE CRIMINAL JURISDICTION.]

REG. v. GAJI KOM RA'NU.

1876.
August 24.

Criminal Procedure Code (Act X. of 1872), Sections 197, 473, and 473—Contempt of Court—False evidence—Commitment—Sentence.

Giving false evidence is "an offence committed in contempt of the authority" of a Court within the meaning of Section 473, of Act X. of 1872. *Reg. v. Narranbeg* (10 Bom. H. C. Rep. 73) and the ruling in 7 Mad. H. C. Rep., Appx. XVII., followed. *Queen v. Kultaran Singh*, L. R., 1 All. 120 and *Queen v. Jugut Mull*, ibid., 162, dissented from (1).

(1) See also the case of *Sufatoolah* (22 W. R. Cr. 49) in which the Calcutta High Court took the opposite view to that taken in the present case.

1876. Where the accused was by a Magistrate, First Class, committed for trial by the Sessions Court on a charge of having given false evidence in a judicial proceeding before the Sessions Judge, there being no Assistant Sessions Judge or Joint Sessions Judge,
 REG.
 v.
 GAI KUM
 RA'NI.

Held that the commitment could not be quashed, there being no error in law, and the case must therefore be transferred for trial to another Court of Session.

In such a case as the above the better course would be for the Magistrate to try the case himself, and, if he is incompetent to pass a sufficient sentence, for the Sessions Judge to refer the case to the High Court for confirmation of sentence.

THE accused Gai Kum Rani was charged with having given false evidence in a judicial proceeding before A. Bosanquet, Session Judge of Ahmednagar. The preliminary enquiry was made by T. S. Hamilton, Magistrate, First Class, who committed her for trial before the same Sessions Judge. Mr. Bosanquet, therefore, submitted the case for the orders of the High Court, as he had no jurisdiction to try it under Section 173 of the Criminal Procedure Code, the offence having been committed in his own Court.

The reference was considered by MELVILL and NA'NA'BHA'I HARMA'S, JJ., on the 21st August 1876, and the following was the judgment of the Court, delivered by

MELVILL, J.:—The Sessions Judge of Ahmednagar being debarred by Section 473 of the Code of Criminal Procedure from trying an offence committed in contempt of his own authority, the case of the *Queen v. Gaji*, wife of Rani, is, under the provisions of Section 61 of the Code, ordered to be transferred for trial to the Sessions Court of Poona.

If it were not for the peculiar wording of Section 173 of the Code of Criminal Procedure, we should have hesitated to accept the broad proposition laid down in *The Queen v. Narayanbhai* (1) that the offence of giving false evidence is to be regarded as a contempt of Court. But (notwithstanding some rulings of the Allahabad Court to the contrary)⁽²⁾ we agree with the Madras High Court⁽³⁾, that the Legislature has, by most inapt words, extended

(1) 10 Bom. H. C. Rep. 73.

(2) *Queen v. Kultaran Singh*, 1 L. Rep. 1 All. 129 and *Queen v. Jugat Mull*, *ibid* 62.

(3) See Proceedings, 24th March 1873, 7 Mad. H. C. Rep., Appx. XVII.

the prohibition contained in Section 473 to the offence of giving false evidence, and that consequently a Sessions Judge cannot try any person for such an offence committed before himself.

1876.
REG.
G. JI KOM
RA'NU.

It follows that, in cases like the present, in which a Magistrate commits a person for trial before the Sessions Court for the offence of giving false evidence before the Sessions Judge, the case cannot be tried by the Sessions Court, unless there be an Assistant Sessions Judge or a Joint Sessions Judge to whom the case can be referred. In Ahmednagar there is no such officer. The commitment cannot be quashed, as there is no error in law (Criminal Procedure Code, Section 197). The only remedy, therefore, is to order the transfer of the case for trial to another Court of Session.

It is obvious that such a proceeding involves much inconvenience and hardship to witnesses. It would be better that, in all such cases arising in districts in which there is no Assistant or Joint Sessions Judge, the Magistrate should try the case himself, and that, if the sentence which the Magistrate is competent to pass is insufficient, the Sessions Judge should refer the case to the High Court for enhancement of sentence.

It is to be hoped that the attention of the Legislature will be directed to the defect in the law which creates this difficulty, and which appears to have been the result of an oversight. When Section 172 of Act XXV. of 1861 was reproduced *verbatim* in Section 472 of the Code of Criminal Procedure, it was, no doubt, the intention of the Legislature that the new section should have the same effect as the old, and that a Court of Session should be able to charge a person for giving false evidence before itself. But this intention has been defeated by the change which has been made in the Schedule of the Code, rendering the offence of giving false evidence triable by a Magistrate of the First Class, and no longer "by the Court of Session exclusively."

Note.—It was held in *Reg. v. Gulabdas* (11 Bom. H. C. Rep. 98) that an offence committed in contempt of the Session Judge's authority was cognizable by the Assistant Sessions Judge.

1876.
September 5.

[APPELLATE CIVIL JURISDICTION.]

Special Appeal No. 211 of 1876.

TUK'AR'AM BIN ATMA'RAM (DEFENDANT AND APPELLANT) *v.* RA'M-CHANDRA BIN BUDHAR'AM (PLAINTIFF AND RESPONDENT).

Mortgage—Possession—Priority—Notice—Estoppel.

Plaintiff claimed under a mortgage, dated the 27th November 1871, for Rs. 50, which was neither registered nor accompanied with possession. Defendant claimed under a mortgage, dated the 17th March 1873, for Rs. 150, which was both registered and accompanied with possession. Defendant had no notice, express or constructive, of the plaintiff's previous mortgage. In 1873 plaintiff sued the mortgagor for a money claim, unconnected with the mortgage, and on the 20th February 1874 obtained a decree for Rs. 100. In execution of this money decree the mortgaged property was attached and sold by the Court, at the plaintiff's instance, the defendant becoming the purchaser for Rs. 86 on the 17th September 1874. An unregistered certificate of the Court's sale, bearing date the 29th October 1874, was issued to defendant. In 1874 plaintiff brought a suit on his mortgage (to which suit defendant was not a party), and obtained a decree (the date of which did not appear in evidence) for possession of the mortgaged property against the mortgagor. In endeavouring to enforce that decree, plaintiff was obstructed by defendant on the 15th January 1875.

Held that, if it was passed subsequent to the Court's sale of the mortgaged property to defendant on the 17th September 1874, the decree for possession was valueless, as neither the title to, nor the possession of, the mortgaged property was then vested in the mortgagor.

Held, further, that as defendant had no notice of the plaintiff's mortgage when plaintiff caused the Court's sale to be made under his money decree, or that the sale was made subject to the plaintiff's mortgage, it was incumbent on plaintiff, as such money judgment-creditor, to inform defendant, when bidding for the right, title, and interest of the judgment debtor in the mortgaged property, that the judgment-creditor (plaintiff) held a mortgage on the same property, and intended to enforce it, especially as the mortgage was neither registered nor accompanied with possession, and that the plaintiff having omitted so to inform the defendant was estopped from enforcing his own mortgage against the defendant.

Itchurām Dayārām v. Rājī Jaga (11 Bom. H. C. Rep. 41) distinguished.

This was a special appeal from the decision of H. J. Parsons, Assistant Judge at Satara, reversing the decree of Achyut Jagannath Ghata, Second Class Subordinate Judge at Rahimatpur.

The plaintiff claimed under a mortgage of 27th November 1871 for Rs. 50, which was neither registered nor accompanied by possession. The defendant claimed under a mortgage of 17th March 1873 for Rs. 150, which was both registered and accompanied by possession. The plaintiff did not allege, nor was

there anything to show, that the defendant, when he took his mortgage with possession, had notice of the plaintiff's unregistered mortgage. On the 20th February 1874 the plaintiff, having obtained a money decree for Rs. 100 against the mortgagors in a suit instituted in 1873, but not in respect of the mortgage, caused the mortgaged property to be attached and sold by the Court, and the defendant became the purchaser for Rs. 86 on 17th September 1874, and obtained a certificate of sale, which he did not register, dated 29th October 1874. The plaintiff alleged that he had, in 1874, obtained a decree for possession in a suit (to which the defendant was not a party) brought on the mortgage, and that in endeavouring to enforce this decree he had been obstructed by the defendant on 15th January 1875. The date of the decree itself did not appear in evidence. The Subordinate Judge threw out the plaintiff's claim, and awarded the possession of the property in dispute to the defendant, on the ground that the defendant had been in possession under his mortgage, and that he subsequently became a purchaser thereof at the Court's sale, caused by the plaintiff in execution of his money decree against the mortgagor. In appeal the Assistant Judge set aside that decision for reasons which are contained in the following extract from his judgment :—

1876.

TUKÁRÁM
BIN ÁTMÁ-
RÁM
"
RÁMCHANDRA
BIN
BUDHARÁM.

" It is a rule of law that a mortgage accompanied with possession is entitled to priority over a prior mortgage unaccompanied with possession ; that is to say, a prior mortgagee cannot object a later mortgagee [with possession] The latter's lien is superior. Simply, therefore, as a question between the parties as mortgagees, the title of the respondent (the defendant Tukárám) would be preferable. But, then, there comes in the fact that the latter (Tukárám) has purchased the right, title, and interest of the mortgagors—i.e., their equity of redemption—and the point arises as to whether he can now set up his mortgage against the appellant's (the plaintiff Rámchandra's) mortgage. I do not think that he can : he cannot divide his title, so to say ; he cannot be mortgagee and vendee, with different rights and liabilities attaching severally to each, at one and the same time. There is a decision which I have just found expressly deciding the point (*Itchárám v. Ráji Jagá*)⁽¹⁾.

(1) 11 Bom. H. C. Rep. 41.

1876.
TUKÁRÁM
BIN ÁRMA-
RÁI
v.
RÁMCHÁN-
DRA PÍN
BUDHARÁM.

There, under similar circumstances, it was held that the purchaser at the Court's sale could not set up his own mortgage, that he stands in the same position as regards subsequent incumbrances as if he had been the mortgagor, and that he cannot set up against them a prior mortgage of his own. That, therefore, is the decision which governs this case. The appellant (the plaintiff Rámchandra), being a mortgagee and having a decree for possession of the land in suit obtained under his mortgage, is entitled to possession from the respondent (defendant Tukárám), who is to be regarded, by virtue of his purchase, as standing in precisely the same place as the mortgagor. I must, therefore, reverse the lower Court's decree, and order that the appellant's (plaintiff Rámchandra's) suit be awarded with costs.

The special appeal was argued before WESTROFF, C.J., and NÁNÁBHÁI HARIDÁS, J.

Bhaironath Mortgage for the special appellant.—The defendant Tukárám is found to have been in possession under his mortgage which has also been registered. Plaintiff was not in possession, nor is his mortgage registered. It has been repeatedly held that a mortgage accompanied with possession prevails against a prior mortgage without possession. Moreover, Tukárám became a purchaser of the mortgaged property at a Court's sale, which took place in execution of plaintiff's money decree against the mortgagor, and plaintiff kept back from defendant's knowledge the existence of his (plaintiff's) own prior mortgage on the same property. Plaintiff does not even allege that defendant had any knowledge of his mortgage. The ruling in 11 Bom. H. C. Rep. 41, relied upon by the Assistant Judge in deciding this case, does not apply, because in that case the defendant, who was a puisne mortgagee in possession, had notice of plaintiff's prior mortgage. Besides, the correctness of the rule laid down in the last clause of the head-note of that case has been very much doubted in the subsequent decisions of this High Court.

Ghanashám Nilkanth Nálkarni, contra, relied upon the case in 11 Bom. H. C. Rep. 41.

WESTROFF, C. J. :—The plaintiff claims under a mortgage of the 27th November 1871 for Rs. 50, which was unregistered and unaccompanied by possession. The defendant claims under a mort-

gage of the 17th March 1873 for Rs.150, which was registered, and which was accompanied by possession. The plaintiff has not alleged that the defendant, when he took his mortgage with possession, had notice of the plaintiff's unregistered mortgage; and the plaintiff not being in possession, and his mortgage being unregistered, there cannot be any presumption that the defendant had any such notice. Further, the plaintiff obtained, on the 20th February 1874, in a suit instituted in 1873, a money decree against the mortgagors (but not in respect of the mortgage) for Rs. 100, and caused the mortgaged property to be attached and sold by the Court. The defendant (being in possession as a mortgagee of 1873) purchased the mortgaged premises for Rs. 86 at that sale on the 17th September 1874, and holds an unregistered certificate of sale of the 29th October 1874. The plaintiff alleges that in 1874 he commenced a suit (to which the defendant was not a party) on the mortgage, and obtained against the mortgagors a decree for possession, and, in endeavouring to enforce it, he was obstructed by the defendant on the 15th January 1875. The date of that decree for possession does not appear in evidence. If it were subsequent to the sale to the defendant, that decree was valueless, as neither the title to, nor the possession of, the land was then vested in the mortgagors. Independently, however, of that circumstance, and whatever may have been the date of the decree, the plaintiff does not allege that the defendant had any notice of the plaintiff's mortgage when the plaintiff caused the Court sale to be made on the 17th September 1874 under his money decree, or that the sale was made subject to the plaintiff's mortgage. It was incumbent on the part of a money judgment-creditor, like the plaintiff, who was causing lands to be sold under his money decree, to let it be known to persons bidding for the right, title, and interest of the judgment-debtor in the land that he, the judgment-creditor, held a mortgage on the same land, and intended to enforce it, and not to keep the mortgage, like a stone in his sleeve, in the dark until after the land had been sold to persons ignorant of the existence of such mortgage. This duty was specially incumbent on a mortgagee whose mortgage was neither registered nor even accompanied by possession. It was for the plaintiff who seeks to eject *bonâ fide* mortgagees in possession under a registered mortgage, to show that he is not estopped from assert-

1876

TUKÁRÁM
BIN ÁTMÁ
RÁM
v.
RÁMCHÁN-
DRA BIN
BUDHARÁM.

1876
TUKÁRÁM
BIN ÁTMA-
RÁM
v.
RÁMCHAN-
DRA BIN
BUDHARÁM.

ing his mortgage without possession by the sale which he caused to be made under a money decree altogether independent of his mortgage, and he certainly would, in our opinion, be so estopped if he did not give warning, at or previously to the sale of the land, to the purchaser of his (the plaintiff's) mortgage on the same land, and that the sale was intended to be subject to such mortgage. This the plaintiff has not even alleged that he did, and still less has he proved it. The plaintiff, in order to obtain as much money as he could under his money decree, was interested in keeping his mortgage secret from intending purchasers. The case, therefore, materially differs from that of *Itchárám DayáráM v. Ráji Jagá⁽¹⁾*, and is not governed by it. We refrain from now expressing any opinion whether we could concur in the ruling mentioned in the last clause of the head-note to that case. For the reason already mentioned, we think that equity forbids that the plaintiff, without making such a special case as we have above indicated, can enforce his mortgage against the defendant to whom the plaintiff himself in execution of a judgment in another suit against the mortgagor, founded upon another cause of action, previously caused the land to be sold.

We reverse the decree of the Assistant Judge, and restore that of the Subordinate Judge, with costs of suit and both appeals to be paid by the plaintiff to the defendant.

[APPELLATE CIVIL JURISDICTION.]

Miscellaneous Regular Appeal No 3 of 1876.

Septem-
 ber 18.

NARSINGRAV RAMCHANDRA (PLAINTIFF AND APPELLANT) *v.*
 LUXUMANRAV (A MINOR SON AND HEIR OF MADHAVEAV, DECEASED,
 REPRESENTED BY HIS ADMINISTRATOR MR E. P ROBERTSON, COLLEC-
 TOR OF DHARWAR, DEFENDANT AND RESPONDENT).

*Act XX of 1864, Sections 11 and 15—Collector—Act XIV of 1869, Sec-
 tion 32—Officer of Government—Jurisdiction*

Sections 11 and 15 of Act XX of 1864, taken together, show that a Col-
 lector, when appointed to take charge of the estate of a minor, is so appoint-
 ed in his capacity as Collector, and therefore, as an officer of Government
 within the meaning of Act XIV of 1869, Section 32

⁽¹⁾ 11 Bom. H C. Rep., 41.

THIS was a miscellaneous regular appeal from the order of the First Class Subordinate Judge of Dharwar.

1876

NARSINGRAV
RÁMCHÁN-
DAS
v.
LUXUMAN-
RAV.

The plaintiff Narsingrav brought this suit, originally against Madhavrav Luxuman, for the recovery of Rs. 11,000 due on a bond dated the 20th April 1868. Shortly after the institution of the suit, Madhavrav died, and the name of his minor son and heir, Luxuman, was substituted, and he was represented by the Collector of Dharwar, Mr. E. P. Robertson, as administrator of his estate. The Subordinate Judge thereupon held that, under the Bombay Civil Courts Act, No. XIV of 1869, Section 32, he had no jurisdiction to try the suit, because the Collector, in his opinion, was an officer of Government. He, accordingly, returned the plaint for its presentation in the proper Court. The present appeal was against that order.

The appeal was argued before WESTROPP, C.J., and KEMBALL, J.

Shamrav Vethal for the appellant :—The real defendant in the case is Luxumanrav, the minor. The Collector comes in merely as the administrator of the minor's estate. He does not represent Government in any sense, and, therefore, ought not to be considered as an officer of Government within the meaning of Section 32 of Act XIV of 1869. Any act done by the Collector under the Minors' Act should not be considered as an act done by him on behalf and as agent of Government.

[WESTROPP, C.J., referred to Sections 11 and 15 of Act XX of 1864, and said that these sections showed the capacity of the Collector when appointed as an administrator of a minor's estate, under the former section, to be that of an officer of Government. His Lordship also referred to *Desaiji Manaji v. Hemadalli*⁽¹⁾.]

The *Honourable Rav Saheb V. N. Mandlick* for the respondent was not called upon.

WESTROPP, C.J. :—The appellant complains that the plaint in this suit, originally instituted against the father of the minor defendant, has been improperly returned to the appellant, since the minor and the administrator of his estate under Act XX of 1864 (the Collector) have been made parties, on the ground that the Subordinate Judge is precluded by Act XIV of 1869, Section

(1) 10 Bom. H. C. Rep., 308.

1876
 NARSINGRAY
 RAMCHANDRA
 v.
 LUXUMAN-
 RAY.

32, from entertaining a suit in which an officer of Government, in his official capacity, is a defendant. For the appellant it is contended that the Collector is acting as the officer of the Court which appoints him administrator of the estate of the infant, and not as an officer of Government. But we think that Sections 11 and 15 of Act XX of 1864, taken together, show that the Collector, when appointed to take charge of the estate of a minor, is so in his capacity as Collector, and, therefore, as an officer of Government. When a Collector is transferred to another district, his successor as Collector succeeds also as administrator of the estates of minors which had been entrusted to the transferred Collector, and no new order of the Civil Court is necessary for that purpose.

We affirm the order with costs, but with this addition, that all proceedings besides the plaint which have been had in this suit in the Subordinate Judge's Court be transferred to the District Court.

[ORIGINAL CIVIL JURISDICTION.]

SUIT No 448 or 1875.

Appeal No. 307.

October 5.

ANANDJI VISRAM (ORIGINAL DEFENDANT, APPELLANT) v. THE NARIAD SPINNING AND WEAVING COMPANY, LIMITED (ORIGINAL PLAINTIFFS, RESPONDENTS).

Company—Shares—Prospectus—Memorandum of Association—Material Variance—Illegal Powers

Distinction pointed out between the case of a person who agrees to take shares in a projected Company upon the faith of a prospectus, and one who does so upon the faith of a document purporting to be the proposed Memorandum of Association of such a Company.

The defendant, on being shown a document purporting to be the Memorandum of Association of a projected Company, signed his name to it, as having taken 4 shares. This document was not registered as the Memorandum of Association of the Company, but another was, which differed from it in omitting, in its 4th clause, the word *yearly* before the word *profits* on which the Company were to pay a certain commission to the Secretaries, Agents, and Treasurers, and in adding to its 6th clause a provision empowering the Company by special resolution in general meeting to subdivide the shares;

Held that the first was not, but the second was, a material variance.

Quære whether the provision empowering the Company to subdivide the shares was illegal. But, even if it was,

Held that the effect of it being practically to alter the position of the defendant from what it would have been had the document signed by him been registered as the Memorandum of Association of the Company, the defendant was not a shareholder in the Company registered.

In re the Financial Corporation (L R. 2 Ch. Ap, 714) commented on.

THIS suit was instituted by the respondent Company, which was a Joint Stock Company incorporated under Act X of 1866, to recover from the appellant defendant the sum of Rs. 2,000 and interest, in respect of two calls of Rs. 250 each on 4 shares in the Company, of which the defendant was alleged to be the holder. The defendant by his written statement admitted that his *Munim* had signed in his name a paper purporting to be the Memorandum of Association of the Nariád Spinning and Weaving Company, Limited, for 4 shares, but said that this paper was not registered as the Memorandum of Association of the Company. That the registered Memorandum of Association, which was registered under Act X of 1866 on 24th October 1874, was signed by seven persons only, of whom the defendant was not one, and differed from the paper signed by the defendant's *Munim* in several particulars, and especially in making the shares liable to sub-division. That the registered Memorandum of Association was accompanied by Articles of Association which were signed by the same seven persons only as had signed the registered Memorandum of Association, and contained clauses widely differing from the regulations contained in Table A to the Indian Companies' Act. That neither the Memorandum of Association nor the Articles of Association so registered were ever submitted to the defendant or his *Munim* for approval or signature, and they would have refused to approve or sign the same. That neither the defendant nor his *Munim* had ever done any act towards taking shares in the Company other than the signature by the *Munim* of the unregistered paper, nor had any scrip or certificate of shares been delivered or offered to the defendant or his *Munim*. That at the time of the signature by the *Munim* it was agreed that such signature should be null and void unless the whole 400 shares, of which the capital of the proposed Company was to consist, should be subscribed for

1876

ANANDJI
VISRAM
v
THE NARIÁD
SPINNING
AND
WEAVING
COMPANY,
LIMITED.

1876
 ANANDJI
 VISRAM
 v.
 THE NARIAD
 SPINNING
 AND
 WEAVING
 COMPANY,
 LIMITED.

and allotted at the time of the registration of the Memorandum and Articles of the Company. That at the time of the filing of the defendant's written statement only 273 shares had been subscribed for and allotted. And that the 5th clause of the Articles of Association gave the Directors an absolute discretion as to the allotment of the shares unallotted at the date of the registration of the Articles of Association. The defendant, therefore, submitted that, under these circumstances he was not the holder of any shares in the Company, and that the signature of his name by his *Mumim* had become null and void.

The cause came on for hearing before Green, J., on 6th October 1875, when two issues were framed: (1) whether the defendant is a member of the plaintiff's Company and a holder of 4 shares therein; (2) whether the signature of the defendant's name by his *Mumim* became and was null and void under the circumstances in the defendant's written statement mentioned. No objection was taken to the authority of the *Mumim* to sign the defendant's name, and it was admitted that the calls were in fact and duly made. The precise date of the signature by the defendant's *Mumim* did not appear, but it was before 24th October 1874. The paper so signed by the *Mumim*, dated 8th September 1874, and stamped with a stamp of Rs. 16, as provided by Act XVIII of 1869 for a Memorandum and Articles of Association, was in the ordinary form of a Memorandum of Association, and bore a considerable number of signatures of different persons as shareholders, upwards of 50 appearing before the name of defendant.

It differed in various unimportant particulars from the registered Memorandum of Association, but the variances on which the defendant chiefly relied were the following:—The 4th clause of the paper signed by the defendant's *Mumim*, in providing for the remuneration of the Secretaries, Agents, and Treasurers of the Company, stated that they should be allowed a commission of $1\frac{1}{2}$ per cent. on all sales made by the Company, but should be allowed a commission of $2\frac{1}{2}$ per cent. on all such sales if the *yearly* profits of the Company amounted to 5 per cent. or more on the paid-up capital. In the corresponding clause in the registered Memorandum of Association the word *yearly* was omitted before profits. The 6th clause of the paper signed by the defendant's

Munim ran thus:—"The capital of the Company is Rs. 4,00,000, divided into 400 shares of Rs. 1,000 each, with power to increase." The corresponding clause in the registered Memorandum of Association omitted the words "with power to increase," and after the words "Rs. 1,000 each" continued thus: "subject to be increased in accordance with the regulations of the Company and the legislative provisions for the time being in force in this behalf, and which said shares may be divided by a special resolution of the shareholders in general meeting into shares of Rs. 500 or Rs. 250 each." The paper signed by the defendant's *Munim* concluded with these words: "We, the several persons whose names and addresses are subscribed, are desirous of being formed into a Company in pursuance of this Memorandum of Association, and we respectively agree to take the number of shares in the capital of the Company set opposite our respective names, and to sign the Articles of Association when ready." In the corresponding clause in the registered Memorandum of Association the words "and to sign the Articles of Association when ready" were omitted.

1876

ANANDJI
VISRAM
v.
THE NARIAD
SPINNING
AND
WEAVING
COMPANY,
LIMITED.

Marriott and *Inverarity*, for the plaintiffs, contended that by the signature of his name by his *Munim* to the unregistered paper the defendant had agreed to become a shareholder. As to the variations, it lay on the defendant to show that these were such as to make a material difference between the objects of the Company as stated in the paper signed in the defendant's name and those contained in the registered Memorandum of Association. In so far as these variations had the effect of giving to the Company powers not authorized by the Act, they were nugatory and inoperative, and, therefore, immaterial. The other variations were mere verbal emendations. Though notice of call and demand of payment were duly served on the defendant, he never repudiated his liability till the suit was brought, and such *laches* disentitled him to contest the fact of being a shareholder. The following authorities were referred to:—Lindley on Partnership (3rd edition), p. 174, *The New Brunswick, &c., Company v. Boore*⁽¹⁾, *Downes v. Ship*⁽²⁾, *Aldous v. Cornwell*⁽³⁾, *Sanderson v. Symonds*⁽⁴⁾,

(1) 3 H. and N., 249.

(2) I. R., 3 Eng. and Ir., Ap. 343.

(3) L. R., 3 Q. B., 573.

(4) 1 Brod. and Bing., 426.

1876 *Tikamdas v. Gangá*⁽¹⁾, *Financial Corporation*⁽²⁾, *The Droitwich Patent Salt Company v. Curzon*⁽³⁾, *Lindley on Partnership* (3rd edition), p. 610, *Taunton v. Royal Insurance Company*⁽⁴⁾, *Simpson v. Directors of the Westminster Palace Hotel*⁽⁵⁾, *Madrid Bank*⁽⁶⁾, *Barnes's Banking Company*⁽⁷⁾, and *Cachar Company*⁽⁸⁾.
 ANANDJI VISRAM v. THE NARIAD SPINNING AND WEAVING COMPANY, LIMITED.

Seoble (Advocate-General), *Latham*, and *Lang*, for the defendant, argued that the paper signed by the defendant's *Munim* purporting to be a Memorandum of Association, the present case must be distinguished from those cited in which persons were held to be shareholders by reason of having agreed to take shares on the faith of a prospectus. If the document signed by the defendant's *Munim* was signed as a Memorandum of Association, the defendant never became a member of the Company, for that was not the memorandum afterwards registered. If the document signed by the defendant's *Munim* was an agreement to take shares, the defendant was entitled to be discharged on the ground of the variance between the document signed by him and the Memorandum of Association afterwards registered. If the document signed by the defendant's *Munim* was a prospectus, the defendant was entitled to be discharged under the agreement by which the signature was to be considered null and void if all the shares were not taken up before the registration of the Memorandum of Association. The variances between the two documents were material. The delay on the part of the defendant in repudiating his liability was not such as to debar him from denying that he was a shareholder.

They referred to the following authorities: *Oolu Lead, &c., Company*⁽⁹⁾, *Felgate's case*⁽¹⁰⁾, *Oakes' case*⁽¹¹⁾, *Lindley on Partnership* (3rd edition), pp. 118, 1423, 1409, and 1415.

Inverarity in reply urged that the condition precedent to the signing by the *Munim* of the paper brought to him as alleged in the written statement was not the one proved by the defendant's witnesses. The paper signed in the defendant's name by his

(1) 11 Bom. H. C. Rep., 203. (2) L. R., 2 Ch. Ap., 714.

(3) L. R., 3 Exch., 35.

(4) 2 Hem. and M., 135.

(5) 8 H. L. Ca., 712.

(6) L. R., 2 Ch. Ap., 536.

(7) L. R., 2 Ch. Ap., 674.

(8) L. R., 2 Ch. Ap., 412.

Rep. (Equity), N. S., 573.

(10) 2 De. G. J. and S., 456.

(11) L. R., 2 Eng. and Ir. Ap., 325.

Munim was evidently not the Memorandum of Association that was to be registered, and of this the defendant or his *Munim* must have been aware at the time of the signature, because at that time there were some 80 signatures before the defendant's, and it was stated that until the Directors were duly appointed, all who signed the Memorandum of Association were to be Directors, but it could never have been intended that there were to be upwards of 80 Directors.

1876
ANANDJI
VISRAM
v.
THE NARIAD
SPINNING
AND
WEAVING
COMPANY,
LIMITED.

On the first issue Green, J., held that the variances relied on by the defendant between the paper signed by his *Munim* and the registered Memorandum of Association were immaterial, inasmuch as they were in every instance, except in Clause 6, mere verbal alterations or corrections which did not affect the sense. As to the alterations made by the registered Memorandum of Association in Clause 6 of the paper signed by the defendant's *Munim*, the learned Judge held that these variances also were legally immaterial, for that as they were inconsistent with the Companies Act X of 1866, which provides that the amount of the shares is to be fixed once for all in the Memorandum of Association, they were nugatory, and inoperative to alter the rights and liabilities of the defendant. On the second issue the learned Judge held that the defendant had failed to prove the agreement on which he relied, and on which, as alleged in the written statement, that issue was founded. A decree was accordingly passed in favour of the plaintiffs for the amount claimed.

Against this decree the defendant appealed, and the appeal was heard by WESTROPP, C.J., and SARGENT, J.

Farran and *Lang* for the appellant.

Marriott, Advocate-General (Acting), and *Inverarity* for the respondents.

The following authorities were referred to in addition to those cited in the Court below:—

Davidson v. Cooper⁽¹⁾, *Croockewit v. Fletcher*⁽²⁾, *Pattinson v. Luckley*⁽³⁾, *Ashbury, &c. Company v. Riche*⁽⁴⁾, *Anglo-Moravian, &c. Company*⁽⁵⁾, *West India and Pacific Steam Ship Com-*

⁽¹⁾ 13 M. and W., 343, affirming S. C., 11 M. and W., 778; 13 L. J. Ex., 276.

⁽²⁾ 1 H. and N., 893; S. C. 26 L. J. Exch., 153. ⁽³⁾ L. R., 10 Exch., 330.

⁽⁴⁾ L. R., 7. Eng. and Ir. Ap., 653.

⁽⁵⁾ L. R., 8 Ch. Ap., 768.

1876 *pany*⁽¹⁾, *Catton v. Simpson*⁽²⁾, Lindley on Partnership (3rd edition),
 ANANDJI 1424, *English, &c. Rolling Stock Company*⁽³⁾, *Marson v. Petit*⁽⁴⁾,
 VISRAM *Master v. Miller*⁽⁵⁾, *Prior v. Shute*⁽⁶⁾, Taylor on Evidence (5th edi-
 v.
 THE NARIAD tion), pp. 1552 and 1617.

SPINNING
 AND
 WEAVING
 COMPANY,
 LIMITED.

The judgment of the Appellate Court was delivered by

SARGENT, J. :—The plaintiffs are a Joint Stock Company incorporated under Act X of 1866, and seek to recover from the defendant, as the registered holder of 4 shares in the Company, the sum of Rs. 2,000 with interest, being the amount of two calls on the above shares. The defence set up is that the defendant is not a member of the Company, and that his name has been improperly placed on the register. There is but little (if any) dispute between the parties as to the circumstances under which the defendant became connected with the plaintiffs' Company. It appears from the evidence of Javerilal Umiashanker, one of the promoters of the Company, that he and his co-promoter prepared a Memorandum of Association, Exhibit A in this suit, and that some short time before the registration of the Company, which took place on 24th October 1874, he went to the defendant's place of business, and after stating to his *Munim*, Kallianji Hansraj, the objects of the Company, and reading to him the substance of the clauses in this Memorandum of Association, proposed to him that his master should take some shares; that Kallianji said he would consider the matter, and that the Memorandum of Association might be sent to his master's office by Liladhur Haridas, a broker; that accordingly, a day or two afterwards, he sent the intended Memorandum of Association (Exhibit A) to the defendant's office by Liladhur Haridas, who had an interview with Kallianji and also with another *Munim* of the defendant, named Mowji Hansraj. From the evidence of Liladhur Haridas and Mowji Hansraj it appears that Liladhur asked Kallianji and Mowji to subscribe for shares and to sign the deed, and that Mowji ultimately agreed to take 4 shares, and signed the deed as a subscriber for those shares. Mowji, however, says that he

(1) L. R., 9 Ch. Ap., 11. Footnote (2). (2) 8 A. and E., 136.

(3) 35 Beav., 646.

(4) 1 Camp. 81. Footnote.

(5) 4 T. R., 320; S. C., 2 H. Bl., 141; 1 Anst., 225; 5 T. R., 637; 1 Smith L. C., 458.

(6) Cited by Buller, J., in *Master v. Miller*, *ubi supra*.

agreed to take the shares on the condition that the whole of the 400 shares, of which the capital of the proposed Company was to consist, should be subscribed for and allotted at the time of the registration of the Memorandum and Articles of Association, and it is not denied that the 400 shares have not been allotted up to the present time. The learned Judge, however, from whose decree this appeal is brought, was of opinion that the existence of such a condition was not established by the evidence, and it was, moreover, rendered highly improbable by the evidence that, notwithstanding the several notices served, and demands made on the defendant, his *Mumum* remained wholly silent, and not until after the suit was instituted set up the defence on the ground of such alleged condition. No objection was taken to that finding, at least in express terms, in the grounds of appeal, but in any case we entirely agree with the learned Judge in the conclusion he arrived at on that part of the case.

1876
ANANDJI
VISHRAM
v
THE NARIAD
SPINNING
AND
WEAVING
COMPANY,
LIMITED.

Subsequently to the above interview between Liladhur Haridas and the defendant's *Mumum*, namely on 24th October 1874, the Company was registered, and on that occasion the document registered as the Memorandum of Association of the Company, in pursuance of Section 17 of the Companies Act 1866, was not Exhibit A, which had been shown to the defendant's *Mumum* as the intended Memorandum of Association, and signed by him as such; but another document, put in evidence as Exhibit No. 1, signed by only seven persons (of whom the defendant is not one), and differing from Exhibit A in several points, of which it is only necessary to mention two, being those which have been relied on as constituting material variances between the two documents. These are: 1st, that although in Clause 4 of Exhibit A it is provided *inter alia* that a commission of $2\frac{1}{2}$ per cent. on sales should be allowed to the Secretaries, Agents and Treasurers, if the *yearly* profits of the Company amount to 5 per cent, or more on the paid-up capital, the word *yearly* was omitted in Exhibit No. 1, which was the document actually subsequently registered. 2nd, Clause 6 of the document shown to the defendant (Exhibit A) ran thus:—"The capital of the Company is Rs. 4,00,000 divided into 400 shares of Rs. 1,000 each, with power to increase." In the document regis-

1876
 ANANDJI
 VISRAM
 "N.
 THE NARIAD
 SPINNING
 AND
 WEAVING
 COMPANY,
 LIMITED.

tered (Exhibit No. 1) the 6th clause was as follows:—"The capital of the Company is Rs. 4,00,000 divided into 400 shares of Rs. 1,000 each, subject to be increased in accordance with the regulations of the Company and the legislative provisions for the time being in force in this behalf, and which said shares *may be divided by a special resolution of the shareholders in general meeting into shares of Rs. 500 or Rs. 250 each.*"

Section 22 of the Companies' Act of 1866 provides that the person signing the Memorandum of Association shall be regarded as a member, and taking the 17th and 22nd sections together the memorandum here spoken of must be the registered Memorandum of Association. The Memorandum of Association of the Company which was registered has not been signed by the defendant's *Munim*. If, therefore, the defendant became a member of the Company, it must be because through his *Munim* (whose authority he has never repudiated) he agreed to become a member, and his name has been entered on the register of members. It is, however, contended for the defendant that he did not agree to take shares in the plaintiff's Company, but in a projected Company, the registered Memorandum of Association of which was to be the document he signed, and no other; but that in any case he ought to be relieved from his agreement to take shares,—1st, because Exhibit A was not registered as the Memorandum of Association of the Company; 2nd, because the Memorandum of Association differs materially from the one shown him as the intended Memorandum of Association; 3rd, because the Articles of Association differ materially from those contained in Table A of the first Schedule of the Act.

With reference to the first objection taken by the defendant, it is to be remarked that this case differs very materially from those in which a person has been induced to take shares on the faith of a prospectus. A prospectus, as Lord Cranworth says in *Downes v. Ship*⁽¹⁾, "is in the nature of instructions only for the professional man to put into shape, in the same way as an agreement is often the foundation for a deed which may properly contain covenants and provisions not found in the agreement itself;" and the only question which can arise is "whether the

obligations incurred under the memorandum do or do not go beyond those which would have been incurred under the prospectus ;” but the Memorandum of Association is, to use an expression of Lord Cairns in *The Ashbury Railway Carriage and Iron Company v. Riche*⁽¹⁾, “the charter of the Company, and defines the limitation of the power of the Company.”

1876
ANANDJI
VISEAM
v.
THE NARIAD
SPINNING
AND
WEAVING
COMPANY,
LIMITED.

The Company is, so to speak, identified by its Memorandum of Association. A person, therefore, who is asked to take shares in a projected Company of which he is shown the Memorandum of Association, and consents to do so, does so upon the full understanding that the document shown him, or a true copy of it, will be registered as the Memorandum of Association. The Company in which he agrees to take shares is the Company to be incorporated by the registration of that document as its Memorandum of Association, and no other Company. Lord Cranworth would appear to have taken that view in *Re Overend Gurney & Co.* when he says,⁽²⁾ “It was said that Mr. Oakes never agreed to become a member of the Company whose business is indicated by the Memorandum of Association actually filed. A change was made in that Memorandum of Association after he had agreed to take shares, and before it was filed. The change was not of any very great importance ; but I am far from saying that if Mr. Oakes had, within a reasonable time after he agreed to take shares, examined the memorandum, and found that it differed, in however small a degree, from that on the faith of which he acted, he might not thereupon have repudiated his status as a shareholder.” We are strongly inclined to think, therefore, that the defendant is entitled to say “I never agreed to take shares in any Company of which the document shown me as Exhibit A, or at least a true copy of it, was not registered as the Memorandum of Association.”

But, however that may be, it is clear that the Memorandum of Association was, at any rate, the basis of the agreement to take shares, and that upon the analogy of those cases in which the Memorandum of Association has differed materially from the prospectus, the defendant must, in the absence of *laches* or other special circumstances, be entitled to relief, if the variances

(1) L. R., 7 Eng. and Ir. Ap., 653 ; see p. 668.

(2) L. R., 2 Eng. and Ir. Ap., 325 ; see p. 369.

1876
 ANANDJI
 VISRAM
 v.
 THE NARIAD
 SPINNING
 AND
 WEAVING
 COMPANY,
 LIMITED.

between the registered Memorandum of Association and Exhibit A are material. In the present case no attempt was even made to charge the defendant with *laches*. Then are the variances here alleged material? With respect to the first variance relied on, viz, the omission of the word "yearly" before the word "profits" in Clause 4, we agree with the learned Judge, that, taking Clause 4 in the registered Articles of Association as a whole, the profits on which it is therein provided that the commission is to be calculated must be deemed to be the yearly profits. Such, we think, must be taken to be the meaning of the contracting parties, in the absence of any qualifying term, in a document of this nature. The omission was, therefore, a merely verbal one.

The second variance relied on as material, which consists in the insertion of words giving the Company the power by special resolution in general meeting to divide the shares previously fixed at Rs. 1,000 each into shares of Rs. 500 or Rs. 250 each, raises a question of some difficulty. Before considering it, it is necessary to dispose of a counter-objection taken by the plaintiff's counsel, viz., that Kallianji, the defendant's *Munim*, had himself expressed to Javerilal, the promoter, his regret that the shares were not of smaller nominal amount. We should feel considerable difficulty in accepting this statement of Javerilal; but in any case the contract which binds the defendant was not entered into on his behalf by Kallianji on the occasion of this alleged conversation, but by Mowji, another *Munim*, whose particular province it would appear to have been to manage such business, and that, too, two or three days subsequently, and nothing then passed that could have led the promoters to suppose that the defendant would not object to such a power.

That this addition was in its nature a material one we think is plain. The nominal value of the shares necessarily determines in no small degree the class of persons who are likely to be members of the Company. The lowering of that value from Rs. 1,000 to Rs. 250 might certainly be expected to introduce a class of shareholders from whom the recovery of their contributions to the unpaid capital in case of dissolution would be rendered more difficult, and thus indirectly enhance the liability of the more wealthy members, who would have to make up the deficiency.

But it was argued that such a provision, however intrinsically material, was contrary to law, and, therefore, null and void, and that, consequently, the insertion of it could not constitute a material variation of which the defendant would be entitled to complain. The learned Judge of the Division Court acceded to this view. The case of *In re the Financial Corporation*⁽¹⁾ was much relied on as establishing the first branch of the argument, viz, the illegality of the provision in question. The determination of this question was, however, not necessary for the decision of that case; and although Lord Cairns expressed a clear opinion that "it would not be competent, even by unambiguous words in the memorandum, to obtain the power of reducing the shares," Lord Justice Turner, on the other hand, whilst admitting that the Memorandum of Association could not be altered for the purpose of reducing the amount of the shares, refused to express any opinion, as being unnecessary for the decision of the case, "upon the effect of the registration of a memorandum containing a provision not warranted by the statute." The question has not, save on that occasion, so far as we are aware, been the subject either of judicial decision or comment, although the general view taken, by the Lords Justices, of the several sections relating to the Memorandum of Association of a registered Company was repeated by Lord Cairns in delivering judgment in the important case of *Ashbury Railway Carriage and Iron Company v. Riche*⁽²⁾, and was adopted by the other Law Lords who took part in its decision. The question, therefore, whether a Company can reserve power to itself, as was done here, by its Memorandum of Association to diminish the amount of the shares, cannot, notwithstanding the *dictum* of so high an authority as Lord Cairns, be regarded as altogether free from doubt. The learned Judge of the Division Court, however, adopted the opinion of Lord Cairns without hesitation, and having pronounced the alteration illegal, and, therefore, as he says, "inoperative or nugatory," decided that it was also immaterial, because, as the learned Judge adds, "it in no way alters the rights and liabilities of the defendant as created by the signature of the Memorandum of Association originally contemplated." Doubtless, if the provision be an illegal one,

1876

ANANDJI
VISRAM
v.
THE NARIAD
SPINNING
AND
WEAVING
COMPANY,
LIMITED.

(1) L. R., 2 Ch. Ap., 714. (2) L. R., 7 Eng. and Ir. Ap., 653.

1876
ANANDJI
VISRAM
v.
THE NARI(D
SPINNING
AND
WEAVING
COMPANY,
LIMITED.

it cannot alter the legal rights and liabilities of the defendant. But is it on that account necessarily immaterial? Does not the very fact of the provision in question forming part of the registered Memorandum of Association, which, as Lord Cairns says in the last-mentioned case⁽¹⁾, "is as it were the Charter," and defines the powers of the Company, make it material? Although the illegality of the provision might justify the Registrar of Joint Stock Companies in refusing to register the Memorandum of Association and to issue a certificate of incorporation, still, when the Company has been incorporated, it would *prima facie* be within the competency of the Company to exercise all the powers given it by the Memorandum of Association, and amongst them the power in question. The Act provides no means of rectifying or altering the Memorandum of Association, except when the Company wishes to change its name. The possibility must, therefore, be assumed of a majority of shareholders wishing to exercise the power in question. Assuming its illegality, the defendant might probably by some proceeding, although what the right proceeding would be is not very clear, succeed in preventing the Company from putting the power in exercise. But in the view of the possibility of his having to resort to legal proceedings, and to incur, it may be, considerable expense, to protect his rights, can it be said that this addition to the Memorandum of Association which he signed is immaterial?

We have hitherto assumed, as the learned Judge has done, that the provision is illegal. But whatever the inclination of our own opinion may be, it is impossible to contend that the question must be regarded as settled, or even that it is altogether free from doubt. That the Company, therefore, should attempt to exercise the power is not a mere possibility, but as probable, perhaps, and as fairly to be expected, as the exercise of any other of the powers which the Company possesses of regulating the conditions of its corporate existence. The defendant is, therefore, we think, entitled to say that whether his legal rights and liabilities are, or are not, affected by the introduction into the memorandum of the power in question, his position is practically

⁽¹⁾ *Ashbury Railway Carriage and Iron Company v. Riche* (L.R., 7 Eng. and Ir. Ap. 653); see p. 668.

altered from what it would have been had the document he signed been adopted as the Memorandum of Association.

1876

The decree of the Court below is, therefore, reversed, and the plaint dismissed with costs. The plaintiffs must also pay the defendant his costs of appeal.

ANANDJI
VISRAM
v.
THE NARIAD
SPINNING
AND
WEAVING
COMPANY,
LIMITED.

[APPELLATE CIVIL JURISDICTION.]

Special Appeal No. 111 of 1876.

BANAPA AND ANOTHER (DEFENDANTS AND APPELLANTS) v. SUNDAR.
DAS JAGJJVANDAS (PLAINTIFF AND RESPONDENT).

Septem-
ber 21.

Indian Evidence Act (I of 1872), Sec. 92—Evidence of oral agreement contemporaneous with a deed of sale.

The defendant admitted the execution of a deed of sale, but alleged that contemporaneously with it he entered into an oral agreement with the vendee that the deed was to be merely a security for the payment of a certain sum of money by the defendant to the vendee, and that a large portion of the sum so secured had already been paid to the vendee.

Held in special appeal that as the alleged agreement was wholly inconsistent with the terms of the deed of sale, evidence to prove such agreement was excluded by Act No. I of 1872, Section 92.

Muttyloll Seal v. Annundochunder Sandle (5 Moore Ind. Ap. 72) distinguished.

THIS was a special appeal from the decision of W. H. Crowe, Senior Assistant Judge at Kaládgi in the District of Belgaum, reversing the decree of Khrishnarao Pandurang, Second Class Subordinate Judge of Bijapur.

The plaintiff, Sundardas, sued to be put in possession of, and have his title declared to, a house situated in Bijápur, and alleged that the defendants, Banápa and Shetapa, sold it, together with some lands and immoveable property, to the plaintiff's brother, Haridás (deceased) for Rs. 1,000, under a deed dated the 20th May 1868; that the whole property was in the possession of the plaintiff, who afterwards let the house to the defendants as

1876 tenants; and that they refused to vacate it. The following is the deed of sale:—

BANÁPA
AND ANOTHER
".
SUNDARDA
JAGJIVAN-
DAS.

"To Rájeshri Haridás Jagjivandas of Baramati, residing in Bijápur. A sale deed is executed by Banápa and Shetapa, sons of Ayapa, residing in the 'Purani Bazaar' Petha, in the city of Bijápur, in the Fasli year 1277 [A.D. 1867-68] as follows:—Having had to pay a debt to Venkan Bhat, son of Shesh Bhat, Chapar Magin Gosavi, residing in the city of Bijápur, this day I* got from him a remission, &c., and had the [amount of the] debt, through the medium of arbitrators, fixed at the sum of (Rs. 1,000) one thousand rupees, and made you responsible to pay the amount to Venkan Bhat. So I become liable to pay you the said one thousand rupees. In lieu thereof, I have this day sold to you, of my [own] accord, my private property, moveable and immoveable, in the city of Bijápur and in the Mahal of Bagayat in the taluka aforesaid of Bijápur, in the sub-division aforesaid, in the division of Kaládgi, of which the particulars are; * * *

[We] have sold, of our [own] accord, to you the moveable and immoveable property, as specified [above], for rupees one thousand, and given the same into your possession this day. Our right and [that of those entitled to] our estate do not subsist upon the property. You may enjoy the same in any way you please. [We] will get the registry of the said lands entered in your name. Your [right of] ownership subsists upon the house, lands, and other property aforesaid. We have no right or interest whatever therein. This we execute of our own accord, and with sound mind and full purpose. Dated the 20th May 1868. Written by Ballaji Ramchandra Kulkarni, in the Kasba of Bijápur.

Witnesses.

- | | |
|--|---|
| (1). Ramchandra Ballaji Morikar, in his own handwriting. | Banapa Betgiri, in his own handwriting. |
| (2). Ragavendra Appaji Nimbalkar. | Shetapa, in his own handwriting." |

The defendants admitted the execution of the deed, but set up a contemporaneous parol agreement in modification of the terms thereof. They stated that they owed Rs. 1,000 to one Venkan

* While the pronoun "I" is used in the first part of this document, the plural "we" appears in the latter part.

Bhat; that the plaintiff's brother, Haridás, undertook to pay off that debt; that the defendants were to repay to Haridás that sum with Rs. 80 for his trouble, by yearly instalments of Rs. 125; that they passed the deed of sale as a security for the repayment of the said amount, of which they had already paid Rs. 821, and had to pay only the balance remaining due; and that, under these circumstances, the deed must not be considered as a sale, but merely as a security for the repayment of money.

The Subordinate Judge of Bijápur allowed the defendants to give evidence of the alleged parol agreement, and holding it proved, rejected the plaintiff's claim. In appeal the plaintiff, *inter alia*, objected that the Subordinate Judge was wrong in admitting evidence of a parol agreement to alter or vary the terms of a written contract. The Assistant Judge, after framing an issue on the point, decided that evidence of such oral agreement was inadmissible under the Evidence Act I of 1872. The following extract from his judgment shows his reasons:—

“The first matter necessary to be considered is whether defendants can be allowed to vary the terms of the written contract by parol evidence to the above effect. I find that in the case of *Dádá Honáji v. Bábáji Jagushet*⁽¹⁾ it was held that evidence of a contemporaneous oral agreement to suspend the operation of a written contract of sale until an agreement for a re-sale is executed is admissible as a defence even in a court of law. So again in *Muttylohl Seal v. Annundochunder Sandile*⁽²⁾ a conveyance by lease and release in fee was held to be subject to a parol defeasance, and to be in the nature of a mortgage. It was then pleaded that the deeds themselves superseded any parol evidence, Statute of Frauds (29 Car. II. c. 3), but their Lordships declined to alter the decision of the Lower Court. In the case of *Bholanath Khetri v. Kali Prasad*⁽³⁾ a contract in writing was admitted by the parties, but it was held that the defendant could give parol evidence to supplement the written contract and show that it was intended to be a mortgage and not an absolute bill of sale. These decisions, however, were all given prior to the passing of the Indian Evidence Act (No. I of 1872) which must now be accepted as the final authority on rules of evidence.

1876
BANÁPA
AND ANOTHER
v.
SUNDARDAS
JAGJIVAN-
DAS.

(1) 2 Bom. H. C. Rep. 36. (2) 5 Moore Ind. Ap. 72. (3) 8 Beng. L. R., 89.

1876 Section 92 of that Act runs as follows :—‘When the terms of any
 BANÍPA such contract, grant, or other disposition of property, or any
 AND ANOTHER matter required by law to be reduced to the form of a document,
 “.
 SUNDARDA have been proved according to the last section, no evidence of
 JAGTIVAN- any oral agreement or statement shall be admitted as between
 DAS. the parties to any such instrument, or their representatives in
 interest, for the purpose of contradicting, varying, adding to or
 subtracting from its terms.’

“This rule is subject to certain provisions which I shall now consider. Proviso 2 lays down that any separate oral agreement as to any matter on which a document is silent, *and which is not inconsistent with its terms*, may be proved. The oral agreement insisted on by the defendants in the present case would alter entirely the complexion of the contract as contained in the written deed. Not only was it not intended to operate as a sale, but it was not even a mortgage with possession, for by the defendants’ account they have never given up possession. If the object of the parties was that alleged by the defendants, nothing could have been easier than to have mortgaged this property for the sum they wanted. The deed in dispute constitutes a binding contract of sale. The defendants set forth therein that they have made plaintiff liable for their debt of Rs. 1,000 to Venkan Bhat, and in lieu thereof they have sold the property enumerated and given possession of the same. The sale is perfectly absolute, not a word about any supplementary agreement being stated. The agreement, which the defendants contend was really entered into, is totally inconsistent with the terms of the written contract. This is the only proviso that appears to me capable of application to the present case. It is not alleged that there was any subsequent oral agreement modifying the terms of the written one, nor that there was a separate oral agreement constituting a condition precedent to the attaching of any obligation under the written contract, but that under no conditions was the written contract intended to operate. I consider that the evidence offered by the defendants is inadmissible by law. I, therefore, pass a decree for specific performance of the written agreement of conveyance. I reverse the decree of the Lower Court, and award plaintiff’s claim. Costs on the defendants throughout.”

The special appeal was argued before WESTROPP, C.J., and KEMBALL, J.

Manecksháh Jehángirsháh (for *Shántarám Náráyan*) appeared for the special appellants.

Pandurang Balbhadra appeared for the special respondent.

The arguments of the pleaders on both sides and the authorities cited by them will appear from the following judgment delivered by

WESTROPP, C.J.:—The deed (Exhibit No. 3), dated 20th May 1868, purports to be a sale of the property mentioned therein by the defendants to Haridás, since deceased, and who is represented by his brother Sundardas as his heir. That sale is, in the deed, stated to be in consideration of Rs. 1,000 paid to Venkan Bhat, who was a creditor of the defendants to that amount. The plaintiff seeks to eject the defendants from a house at Bijápur forming part of the property mentioned in the deed. The defendants admit that they executed the deed, and do not allege that they were induced so to do by fraud or intimidation on the part of Haridás, the vendee, or that they were under any mistake in fact or in law, or any fact invalidating it, or other circumstance bringing them within the exceptions in Proviso 1 to Section 92 of the Indian Evidence Act I of 1872. The defendants, however, allege that, contemporaneously with the deed of sale, they entered into an oral agreement with Haridás that the deed of sale was to be merely a security for the sum of Rs. 1,000 paid, as already mentioned by him, to Venkan Bhat and Rs. 80 for his trouble, and that they would repay him that amount of Rs. 1,080 by yearly instalments of Rs. 125. They also averred that they had repaid him Rs. 821, and that only the balance remained due to Haridás or his representative. The Subordinate Judge admitted evidence of the alleged oral agreement contemporaneous with the deed of sale, and held that oral agreement to be proved. The Assistant Judge has reversed that decree, because he was of opinion that, whatever may have been the former state of the law as to the admissibility of such evidence, it was excluded by section 92 of the Indian Evidence Act; and in that opinion we concur, inasmuch as the oral agreement, alleged to have been entered into contemporaneously with the deed, was wholly inconsistent with

1876

BANÁPA
AND
ANOTHER
v.
SUNDARDAS
JAGJIVAN-
DAS.

1876
BANAPA
AND
ANOTHER
v.
SUNDARIDAS
JAGJIVAN-
DAS.

the terms of the deed, and we are unable to conceive a case in which Section 92 would exclude evidence of an oral agreement if it would not do so in this case. The defendants do not contend that they supposed the deed of sale when they executed it to be other than what it purports to be; but they say it is modified by the contemporaneous oral agreement, and it has been argued for them that it is a fraud on the part of Haridas to treat the deed of sale as such; but that would not be a contemporaneous but a subsequent fraud, or rather a breach of the oral contract; and, if we were to hold that to be such fraud as is contemplated by the first proviso to Section 92, we should be rendering that section nugatory; for, in every case in which a party stood upon the written contract, and declined to act upon the alleged oral contract, fraud might be equally imputed, and the apparent object of the section—viz, the discouragement of perjury—would be frustrated. There would appear to have been some conflicting decisions on the state of the law on such a point before the Indian Evidence Act came into force—see *ec gr. Dada Honaji v. Babaji Jagushet*⁽¹⁾, *Guddalur v. Kunnattur*⁽²⁾, and *Bholunath Khettri v. Kaliprasad Agurwalla*⁽³⁾ on the one side and the Full Bench case *Kasheerath Chatterjee v. Chundy Churn Banerjee*⁽⁴⁾, and the authorities there cited. It is unnecessary for us to give any opinion as to which of these decisions was right, inasmuch as we think that such cases as the present were those in which the Legislature, by Section 92 of the Indian Evidence Act, intended to exclude evidence of oral agreements contemporaneous and inconsistent with written agreements. The circumstances in the case of *Muttyloll Seal v. Annulochunder Sandle*⁽⁵⁾, were very special. There were a bond and warrant of attorney to confess judgment with a defeasance thereupon indorsed, prior to the release, and lease of even date with the release, which tended to show that the release, though absolute in form, was intended to be a mortgage, which prevent that case from being applicable on the present occasion where all of those circumstances are absent.

The decree must, we think, be affirmed with costs.

⁽¹⁾ 2 Bom. H. C. Rep. 36.

⁽²⁾ 7 Mad. H. C. Rep. 189.

⁽³⁾ 8 Beng. L. R. 89.

⁽⁴⁾ 5 Calc. W. R. 68 Civ. Rul.

⁽⁵⁾ 5 Moore Ind. Ap. 72.

[APPELLATE CRIMINAL JURISDICTION.]

Criminal Reference No. 84 of 1876.

REG. v. PARSAPPA MAHADEVAPPA.

1876.
August 17.

Contempt of Court—Criminal Procedure Code (Act X of 1872), Sections 435, 436, 471, 472, and 473—Nuisance—Injunction to discontinue—Indian Penal Code (Act XLV of 1860), Section 291.

Section 473 of the Code of Criminal Procedure, which, except as therein provided, forbids a Court to try any person for an offence committed in contempt of its own authority, is not limited to offences falling under Chapter X of the Indian Penal Code, but extends to all contempts of Court.

Reg. v. Kultáran Singh (I L. R. 1 All. 129) dissented from.

7 Mad. H. C. Rep. Ap. XVII approve.

Reg. v. Navranbeg Dulábeg (10 Bom. H. C. Rep. 73) followed.

THIS was a reference made by A. R. Macdonald, Magistrate of the District of North Kanara, under Section 297 of the Code of Criminal Procedure. The accused was tried and convicted by the Second Class Magistrate of Haliyál for continuance of nuisance after injunction to discontinue it under Section 291 of the Indian Penal Code. The injunction having been issued by the Magistrate himself, Mr. Macdonald doubted the legality of the trial before that Magistrate; and hence referred the case for the orders of the High Court.

The case was heard by MELVILL and NANABHAI HARIDAS, JJ.

Neither the accused nor the Crown was represented.

PER CURIAM:—The Court does not think that it can follow the Allahabad High Court⁽¹⁾ in holding that Section 473 of the Criminal Procedure Code, when it says that no Court shall try any person for an offence committed in contempt of its own authority, is to be limited to offences falling under Chap. X of the Indian Penal Code. The reasons given by the Madras High Court⁽²⁾ for extending the section, at all events, to the offences against public justice and the offences relating to documents mentioned in Sections 468 and 469 of the Criminal Procedure Code are, in the Court's mind, conclusive; and a Division Bench of this Court⁽³⁾

⁽¹⁾ (*Queen v. Kultáran* (I. L. R. 1 All. 129).

⁽²⁾ Proceedings, 24th March 1873 (7 Mad. H. C. Rep. Appendix XVII).

⁽³⁾ *Reg. v. Navranbeg* (10 Bom. H. C. Rep. 73).

1876

REG. v.
PARSAPÁ
MÍHÁ-
DEVÁPÁ.

seems to have been of opinion that the section must be held applicable to all contempts of Court. If the limitation imposed upon the section by the Allahabad Court be removed, as the Court thinks it must, the section must necessarily be held applicable to the case now before it; for the continuance of a nuisance, after the Magistrate's injunction to desist, is clearly a contempt of the Magistrate's authority.

The Court considers it must, therefore, annul the conviction and sentence.

Note.—See in addition to the cases cited in this judgment the case of *Sufatoolah* (22 Cal. W.R. 49 Cr. Rul.), *Queen v Jagat Mal* (I. L. R. 1 All. 162), *Queen v. Gur Baksh* (I. L. R. 1 All. 193), and *Reg. v. Guji Kom Ranu* (I. L. R. 1 Bom. 311).

[APPELLATE CRIMINAL JURISDICTION.]

Reference No. 63 of 1876.

August 10.

REG. v. LOCHA KALÁ.

Extradition—The Code of Criminal Procedure (Act X of 1872), Section 157—Warrant—Police Officer.

It is not essential to the validity of a warrant issued under Section 157 of Act X of 1872 that the Magistrate, issuing it, should be, at the time he issues it, within the local limits of his jurisdiction. He may issue such a warrant from a place in foreign territory.

THIS was a reference from A. Borradaile, Magistrate of Ahmedabad, under Section 296 of the Code of Criminal Procedure.

The Magistrate stated that Major Wodehouse, Assistant to the Political Agent in Kattywar, and Magistrate F. C. in the Ahmedabad District, issued from Camp Wadhwan, a place in Kattywar, a warrant for the apprehension of a non-European British subject, in respect of an offence committed in Kattywar. The warrant was addressed to the Fouzdar of Palyad who, though Palyad is in foreign territory, was invested with police powers

extending over Chowria, a village of the Dhandhuka Taluka of the Ahmedabad District, where the accused was captured in execution of the warrant. Mr. Borradaile was of opinion that the warrant having been issued from foreign territory was illegal and should be set aside. He considered "that the offender being a resident of the Ahmedabad District should only have been arrested on a warrant issued by the Political Agent, under Section 11 of Act XI of 1872, or, Major Wodehouse having been duly authorized (*vide* notification dated 10th August 1875, published at page 802 of the *Bombay Government Gazette*, dated 12th idem), on a warrant issued by Major Wodehouse, under Section 157 of the Code of Criminal Procedure, *within* the district, the issue of a warrant being a portion of the inquiry which Section 63 of the Criminal Procedure Code directs shall be made in the district. The warrant was executed by a foreign fouzdar who has not the charge of a police station in British territory. Section 161, Criminal Procedure Code, orders that a warrant shall ordinarily be directed to a police officer, but if no police officer be immediately available, the Magistrate may direct it to any other person. In the present case the police of this district were immediately available."

1876

RFA. v.
LOCUÁ
KALÁ.

The reference was heard by KEMBALL and NANABHAI HARIDAS, JJ.

PER CURIAM:—Section 63 of the Criminal Procedure Code has no application to the present case. The offence having been committed in a foreign territory, the presence of Major Wodehouse in the portion of Ahmedabad District in which he has jurisdiction was unnecessary for the purposes of issuing the warrant.

Major Wodehouse having jurisdiction in the place where the offender was found, it was competent to him, under the provisions of Section 157 of the Criminal Procedure Code, to issue his warrant for the arrest of such offender.

The Pályád Thánadár appears to have been invested with police powers extending over the village where the accused was arrested. The issue of the warrant, therefore, to him was perfectly legal.

[APPELLATE CRIMINAL JURISDICTION.]

1876
July 18.

REG. v GOVINDA.

*Murder—Culpable homicide—Indian Penal Code (Act XXV of 1860),
Sections 299 and 300.*

Where the prisoner knocked his wife down, put one knee on her chest, and struck her two or three violent blows on the face with the closed fist, producing extravasation of blood on the brain, and she died in consequence, either on the spot, or very shortly afterwards,

Held, that there being no intention to cause death, and the bodily injury not being sufficient in the ordinary course of nature to cause death, the offence committed by the prisoner was not murder, but culpable homicide not amounting to murder.

THIS case was sent up for the confirmation, by the High Court, of the sentence of death passed on the prisoner by R. F. Mactier, Session Judge of Satara, on a conviction of murder.

The first issue raised by Mr. Mactier was “whether Bálái, the prisoner’s wife, died from violence or not?” and he determined it in the affirmative, saying:—

“The medical evidence is clear on this point. The hospital assistant says that Bálái died from effusion of blood on the brain, arising from a blow just above, and towards the inner corner of the left eye, and at this place, rather towards the corner of the eye, there is said to have been the external mark of a blow; the inquest juryman, Ravji, says that there were ten marks of beating on the back in several places as well as the contusion on the eye, and the bleeding at the nose was probably caused by the blow in this neighbourhood. It is not very easy to say how far the beating extended to which the deceased was subjected, but it is clear that it was very severe, and possibly more injuries may have been inflicted than are spoken of; the hospital assistant, however, is clear on one point, that death arose in this case from effusion of blood on the brain.”

The second issue raised was “whether the violence was inflicted by the prisoner;” and this, too, was decided in the affirmative for

reasons which it is unnecessary for the purposes of this report to state.

1876

 REG. v.
GOVINDÁ.

The third issue was "whether this was 'murder' or the minor offence of culpable homicide?" In determining this, the Judge said:—

"I must hold that it was the more serious offence. There was no grave and sudden provocation, but this last beating seems to have been the conclusion of a long-continued series of beatings and the violence committed was such that the prisoner in committing it, took on himself the risk of causing death thereby
* * *."

The case came on for hearing before KEMBALL and NANABHAI HARIDAS, JJ.

Dhirajlal Mathuradas, Government Pleader, appeared for the Crown.

Their Lordships at the outset intimated to the Government Pleader that there was a difference of opinion between them as to what offence the prisoner had committed, and that the case should accordingly be referred to MELVILL, J., for his opinion.

In reviewing the case, Mr. Justice KEMBALL minuted thus:—

"That the prisoner was exceedingly cruel to his wife, and that he was legally guilty of her murder, I have no doubt; but having regard to the circumstances, the age of the prisoner, and the manifest state of doubt of the Judge as to the what would be the appropriate sentence, make me hesitate to confirm the sentence of death, and I am disposed to alter it to transportation for life."

Mr. Justice NANABHAI HARIDAS' minute ran thus:—

"I am not satisfied that the prisoner intended to murder his wife. There is hardly evidence sufficient to prove the 'intention' or 'knowledge' requisite under Section 300, Indian Penal Code.

"That the prisoner acted cruelly, is quite clear. Still there is no evidence that he beat her otherwise than with his fist on the face, the blow or blows on the nose causing effusion of blood on the brain which proved fatal. The kicks on the back and the

1876
REG v.
GOVINDI.

blows on the chest were not the cause of death according to the doctor's evidence. It is quite possible—by no means improbable—that he may have, as he says, only intended to chastise her, though rather severely. I am disposed to think his act was culpable homicide not amounting to murder, and that it is punishable under Section 304, Indian Penal Code.

“No apparent motive is shown for taking her life.

“People often survive such blows, and the prisoner may have only intended to cause hurt, though aware that hurt might prove dangerous.”

MELVILL, J.—I understand that these proceedings have been referred to me under Section 271-B of the Code of Criminal Procedure, in order that I may decide whether the offence committed by the prisoner was murder, or culpable homicide not amounting to murder.

For convenience of comparison, the provisions of Sections 299 and 300 of the Indian Penal Code may be stated thus:—

Section 299.

Section 300.

A person commits culpable homicide, if the act by which the death is caused is done

Subject to certain exceptions, culpable homicide is murder, if the act by which the death is caused is done

(a) With the intention of causing death;

(1) With the intention of causing death;

(b) With the intention of causing such bodily injury as is *likely* to cause death;

(2) With the intention of causing such bodily injury as the offender *knows to be likely* to cause the death of *the person to whom the harm is caused*;

(3) With the intention of causing bodily injury to any person, and the bodily injury intended to be inflicted is *sufficient in the ordinary course of nature* to cause death.

(c) With the knowledge that * * * the act is likely to cause death.	(4) With the knowledge that the act is <i>so imminently dangerous that it must in all probability cause death,</i> or such bodily injury as is likely to cause death.	1876 REG. v. GOVINDÁ.
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I have *underlined* the words which appear to me to mark the differences between the two offences,

(a) and (1) show that where there is an intention to kill, the offence is always murder.

(c) and (4) appear to me intended to apply (I do not say that they are necessarily limited) to cases in which there is no intention to cause death or bodily injury. Furious driving, firing at a mark near a public road, would be cases of this description. Whether the offence is culpable homicide or murder, depends upon the degree of risk to human life. If death is a likely result, it is culpable homicide; if it the most probable result, it is murder.

The essence of (2) appears to me to be found in the words which I have underlined. The offence is murder, if the offender *knows* that the *particular person injured* is likely, either from peculiarity of constitution, or immature age, or other special circumstance, to be killed by an injury which would not ordinarily cause death. The illustration given in the section is the following:—

“A, knowing that Z is labouring under such a disease that a blow is likely to cause his death, strikes him with intention of causing bodily injury. Z dies in consequence of the blow. A is guilty of murder, although the blow might not have been sufficient in the ordinary course of nature to cause the death of a person in a sound state of health.”

There remain to be considered (b) and (3), and it is on a comparison of these two clauses that the decision of doubtful cases like the present must generally depend. The offence is culpable homicide, if the bodily injury intended to be inflicted is *likely* to cause death; it is murder, if such injury is *sufficient in the ordinary course of nature* to cause death. The distinction is fine, but appreciable. It is much the same distinction as that between (c) and (4), already noticed. It is a question of degree of probabi-

1876 lity. Practically, I think it will generally resolve itself into a
 REG. " — consideration of the nature of the weapon used. A blow from the
 GOVINDÁ. fist or a stick on a vital part may be likely to cause death; a
 wound from a sword in a vital part is sufficient in the ordinary
 course of nature to cause death.

In the present case the prisoner, a young man of 18, appears to have kicked his wife (a girl of 15) and to have struck her several times with his fist on the back. These blows seem to have caused her no serious injury. She, however, fell on the ground, and I think that the evidence shows that the prisoner then put one knee on her chest, and struck her two or three times on the face. One or two of these blows, which, from the medical evidence, I believe to have been violent and to have been delivered with the closed fist, took effect on the girl's left eye, producing contusion and discoloration. The skull was not fractured, but the blow caused an extravasation of blood on the brain, and the girl died in consequence either on the spot, or very shortly afterwards. On this state of facts the Sessions Judge and the assessors have found the prisoner guilty of murder, and he has been sentenced to death. I am myself of opinion that the offence is culpable homicide, and not murder. I do not think there was an intention to cause death; nor do I think that the bodily injury was sufficient in the ordinary course of nature to cause death. Ordinarily, I think, it would not cause death. But a violent blow in the eye from a man's fist, while the person struck is lying with his or her head on the ground, is certainly likely to cause death, either by producing concussion or extravasation of blood on the surface or in the substance of the brain. A reference to Taylor's Medical Jurisprudence (Fourth Edition, page 294) will show how easily life may be destroyed by a blow on the head producing extravasation of blood.

For these reasons I am of opinion that the prisoner should be convicted of culpable homicide not amounting to murder, and I would sentence him to transportation for seven years.

This order was accordingly passed by the Court.

[APPELLATE CRIMINAL JURISDICTION.]

REG. v. SAMBHU RAGHU.

1876
September 7

*The Indian Penal Code (Act XLV of 1860, Section 494)—Bigamy y—
Authority of caste to declare a marriage void.*

Courts of law will not recognize the authority of a caste to declare a marriage void, or to give permission to a woman to re-marry.

Bonâ fide belief that the consent of the caste made the second marriage valid does not constitute a defence to a charge, under Section 494 of the Indian Penal Code, of marrying again during the lifetime of the first husband, or to a charge of abetment of that offence under that section combined with Section 109.

THIS was an appeal from the sentence of six weeks' simple imprisonment passed by H. Batty, Assistant Session Judge of Khandesh, on the appellant Sambhu for abetting the re-marriage of one Narbadâ, a woman of the Teli caste, during the lifetime of her first husband. Narbadâ herself was convicted and sentenced to two months' simple imprisonment. The facts appear from the following extract from Mr. Batty's judgment :—"The facts of the case are not disputed, and are as follows: The complainant Ishrâm was legally married to accused No. 1, Narbadâ, about 14 years ago. She lived with him till within 2 years of the present trial. She then returned to her parents. The complainant, Ishrâm, remained at Shirpur.

"On the 30th June 1875 accused No. 1 gave notice to the complainant Ishrâm, that, having discovered that he was afflicted with leprosy, she had determined to re-marry. She called upon her husband, therefore, either to send a certificate of his cure, or to consent to her re-marriage. He replied by post. His answer has not been put in evidence by the defence, having apparently been lost. No evidence has been given to refute his description of its contents. According to Ishrâm, the letter written at his dictation stated that he was too ill to come; that Nârbadâ was to bring her ornaments to Shirpur, and that if a few were broken it was no matter. Ishrâm denies that he gave any authority for a second marriage. About three months after this notice, Narbadâ had the whole of the Teli caste convened to decide whether she was justified in marrying again.

1876

REG. 7
GOVINDA.

lity. Practically, I think it will generally resolve itself into a consideration of the nature of the weapon used. A blow from the fist or a stick on a vital part may be likely to cause death; a wound from a sword in a vital part is sufficient in the ordinary course of nature to cause death.

In the present case the prisoner, a young man of 18, appears to have kicked his wife (a girl of 15) and to have struck her several times with his fist on the back. These blows seem to have caused her no serious injury. She, however, fell on the ground, and I think that the evidence shows that the prisoner then put one knee on her chest, and struck her two or three times on the face. One or two of these blows, which, from the medical evidence, I believe to have been violent and to have been delivered with the closed fist, took effect on the girl's left eye, producing contusion and discoloration. The skull was not fractured, but the blow caused an extravasation of blood on the brain, and the girl died in consequence either on the spot, or very shortly afterwards. On this state of facts the Sessions Judge and the assessors have found the prisoner guilty of murder, and he has been sentenced to death. I am myself of opinion that the offence is culpable homicide, and not murder. I do not think there was an intention to cause death; nor do I think that the bodily injury was sufficient in the ordinary course of nature to cause death. Ordinarily, I think, it would not cause death. But a violent blow in the eye from a man's fist, while the person struck is lying with his or her head on the ground, is certainly likely to cause death, either by producing concussion or extravasation of blood on the surface or in the substance of the brain. A reference to Taylor's Medical Jurisprudence (Fourth Edition, page 294) will show how easily life may be destroyed by a blow on the head producing extravasation of blood.

For these reasons I am of opinion that the prisoner should be convicted of culpable homicide not amounting to murder, and I would sentence him to transportation for seven years.

This order was accordingly passed by the Court.

[APPELLATE CRIMINAL JURISDICTION.]

REG. *v* SAMBHU RAGHU.1876
September 7.

*The Indian Penal Code (Act XLV of 1860, Section 494)—Byam y—
Authority of caste to declare a marriage void.*

Courts of law will not recognize the authority of a caste to declare a marriage void, or to give permission to a woman to re-marry.

Bonâ fide belief that the consent of the caste made the second marriage valid does not constitute a defence to a charge, under Section 494 of the Indian Penal Code, of marrying again during the lifetime of the first husband, or to a charge of abetment of that offence under that section combined with Section 109.

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1876

REG. v.
SAMBHU
RANU.

"The prosecution does not dispute the assertion of the accused that this meeting was regularly summoned, that a quorum assembled, and that an unanimous vote was passed in favour of the re-marriage. It is only contended that the caste had no authority to make such a decision; that in the absence of a *sod chutti* or *pharkhut*, and in the absence of the husband also, it was contrary to the custom of the caste for such marriages to be allowed, and that the former marriage was not, therefore, void at the time the second marriage was contracted.

"The accused do not deny the celebration of the *pát* marriage. The complainant, Ishráam, objected, after solemnization of the marriage, that he had not been repaid his marriage expenses. It was on this ground, he stated, he would make a complaint, unless they were delivered to him. During the progress of the case the complainant, Ishráam, tendered a *raznáma* from which he appears to have been willing to consent to the dissolution of his marriage with Narbadá on receipt of the expenses which had been incurred by him. This *raznáma* was of no avail to stop the criminal proceedings commenced, but is put in evidence, apparently, with the object of showing that Ishráam had not previously made any formal abrogation of his conjugal rights.

"The facts being in all essential points admitted, the question that remains for decision is one purely of law.

"The provisions of Section 494 appear to be somewhat rigid and difficult of application in the case of low-caste Hindus, among whom a considerable amount of laxity is allowed in the rules which regulate the dissolution of marriages. Section 494 does not admit as a valid plea the ignorance or belief of the contracting parties as to the dissolution of the former marriage. It provides that in any case in which such marriage is void by reason of its taking place during the life of the husband or wife the contracting parties are liable, unless the former marriage has been declared void by a Court of competent jurisdiction. If, therefore, the marriage has been declared void by an authority not competent to make such a decision (as in the case of a *Páneh*), the accused would not be entitled to plead that he or she believed it to have been so dissolved. In the case of the charge being made, however, under Section 497 against the male offender, there will be no

ground for a conviction unless the offender knows or has reason to believe his partner in guilt to be the wife of another man. This distinction appears to have been observed in the case of *Karsan Goya* and *Bar Rápa*.⁽¹⁾ For in that case, though the High Court called for a finding as to the belief of the male offender on the validity of the alleged dissolution of marriage (he having been charged under Section 497), it appears that this finding, even if favourable to him, was not to have affected the liability of the other accused who was charged under Section 494. It would thus appear that, if, under a mistaken belief that the former marriage had been dissolved, a man contracted a second marriage with a woman whose first husband was living, he would be unable, if charged under Sections 494 and 109, to plead such belief. If, however, he were charged, not only with having gone through the ceremony, but with having consummated it by sexual intercourse under Section 497, he would then be able to give evidence as to his *bona fides*, and if he could prove it, would be entitled to an acquittal. To charge the accessory contracting party under Sections 494 and 109 seems, therefore, in some cases to be a course calculated seriously to prejudice the accused, though it may be unavoidable where there is no evidence to show that the second offence (under 497) has been committed. The personal impression of the Court is, that a decision has been passed by the High Court to the effect that the man contracting a second marriage under such circumstances was not liable to be charged under Sections 494 and 109 as an abettor, and that he could only be charged under Section 497; but as, after some search, no such decision could be found, and the precise nature of the ruling could not be recalled, there seemed to be no authority for amending the charge as framed by the Magistrate.

“As the question of accused No. 2’s knowledge or belief in the matter seems, therefore, to be irrelevant, the point which remains for decision is, whether the former marriage was void. The words of the Code are ‘a Court of competent jurisdiction.’ Whether a *Panchayat*, except as specified in the illustration to Section 20 of the Indian Penal Code, could be regarded as a Court at all, has not been

⁽¹⁾ 2 Bom. H. C. Rep. 117 (2nd edition), 124 (1st edition), see also *Reg. v. Manohar* (5 Bom. H. C. Rep. 17 Cr. Ca.); *Khemkor v. Unidshankar* (10 Bom. H. C. Rep. 381); and *Ráhi v. Govind* (L. L. R. 1 Bom. 97, per Westropp, C.J., at p. 116).

1876

 REG. v
 SAMBHU
 RAGHU.

1876

REG. v.
SAMBHU
RAGHU

definitely ruled. From the illustration adverted to above, it seems as if it could not, on the maxim '*Expressio unius est exclusio alterius*.' Whether it could be regarded as a Court of competent jurisdiction to declare a marriage void, seems, from the case of *Reg. v. Mavohan*⁽¹⁾ and the cases cited in the note to it, still more questionable. However this may be, the Courts have always recognized the rules laid down by established caste customs, unless positively opposed to morality, as entitled to consideration in determining the question of the validity of a divorce. Among the lower castes of the Hindus it is a widespread, if not a correct, belief, that where a *phurkhat*, *sod chitty* or letter of divorce, has been given by the husband, and a *Panchayat* has decided that the marriage has been dissolved, the party so divorced is at liberty to marry again on repayment of the marriage expenses incurred by the first husband. The right of divorce appears, however, by custom to be purely marital, though, according to Grady⁽²⁾, 'amongst some of the lower castes, divorce is obtainable by each, and the woman may marry again.' Strange's Hindu Law⁽³⁾ also contains the following remarks:—'Marriage having taken place, it would seem as if the right of divorce was, in general, by the Hindu Law, as it is by our own, marital only: not competent to the wife, unless by custom * * *

The exception may be regarded as proving the rule, their being castes (of the lowest kind indeed) in which not only is divorce attainable on either side, but where, having taken place, the woman may marry again; such marriage is called *natra*, being in familiar use at Bombay.' From this it would appear that in some cases the *natra*, *mohatur* or *pât* marriage can, in some castes, be contracted during the lifetime of the husband, on the authority of the caste assembly, even though the woman take the initiative. It is, however, limited apparently to the lowest castes, and whether the Teli caste (to which the accused belong) is to be regarded as one of these, seems extremely doubtful. In Steele's Law and Customs of Hindu Castes⁽⁴⁾ the following report is given:—'During the husband's life there can be no *pât* in our caste'—as the opinion of the Jeshwar and Batree Telis, but is not laid

⁽¹⁾ 5 Bom. H. C. Rep 17 Cr. Ca.

⁽²⁾ Treatise on the Hindu Law of Inheritance, p. 15.

⁽³⁾ P. 52, 3rd edition.

⁽⁴⁾ Appendix, p. 364.

down as the custom of the Marathi Teli. It was evidently the duty of the accused in the present case to show that such a re-marriage was, under the alleged circumstances, permissible by the custom of their caste. They produced, however, no evidence; and while it would hardly have been equitable to have called as witnesses members of the caste in a different locality, to have taken the evidence of those living in the vicinity of the accused would have been nugatory, as they had already, by their votes, as is admitted, unanimously attested the existence of such a custom. To call for their evidence would have been to offer an opportunity for the gratification of private grudges or personal partiality.

1876

 REG v.
SAMBHU
RÁGHU.

The burden of proof was on the accused, and they were bound to show that it was the custom of their caste to recognize, as wholly void, marriages declared by the caste assembly to be dissolved; that the caste assembly was competent to act upon the application of the wife, even without the presence or consent of the husband; and that the marriage could be dissolved without any *pharkhut* being given, and before the return of the marriage expenses to the former husband. They have failed to make out that such was the custom of the caste, though the mere fact of their having voted for the dissolution of the marriage shows that a large number of persons believed it to be so. In the absence of proof of such custom the first issue must be decided in the negative. There is, indeed, some ground for believing that the caste in this instance did not act quite regularly, as no marriage expenses were paid. * * *

The appeal was made to the High Court by Sambhu Rághu alone.

It was heard by MELVILL and NANABHAI HARIDAS, JJ.

Shántarám Náráyan for the appellant:—The Session Judge does not impugn the *bonâ fides* of the appellant or his fellow-prisoners, and should not have found them guilty. There is no question that the husband of Narbadá was a leper, and that all he cared for was his expenses. He may, therefore, be taken to have given a consent to the second marriage. The caste of the Telis, to which the parties belonged, regularly assembled and confirmed the dissolution of the first marriage. The second marriage was, therefore, no offence.

1876

REG. n.
SAMBHU
NAGHU.

Honourable R. S. Vishwanāth Nārāyan Mandlik, Government Pleader, for the Crown:—The real question in the case is, had the caste authority to declare Narbadā's first marriage void? I say it had not. In absence, therefore, of a *pharkhut* from Narbadā's first husband, her second marriage was clearly an offence. The belief of the parties does not affect the legal question at all.

PER CURIAM:—The Acting Session Judge has considered this case very carefully, and the Court agrees in his conclusion. The Court does not find it established that there is any valid custom by which a woman of the caste of the first accused can claim a right to marry again, because her husband is a leper, and without having obtained a release from him. The Court does not recognize the authority of the caste to declare a marriage void, or to give permission to a woman to re-marry. The wife in this case, and the appellant who performed the ceremony of re-marriage, probably acted in a *bona fide* belief that the consent of the caste made the second marriage valid; but though that circumstance may be taken into account in mitigation of punishment, it does not constitute a defence to a charge under Section 494 of the Indian Penal Code, or under that section combined with Section 109 of the Code. The Court confirms the conviction; but, as the appellant has already undergone imprisonment for 25 days, it remits the remainder of his sentence.

[APPELLATE CIVIL JURISDICTION.]

Cross Special Appeals Nos. 185 and 241 of 1875.

No. 185.

Septem-
ber 26.

THE COLLECTOR OF THANA (SPECIAL APPELLANT) v. DADABHAI
BOMANJI (SPECIAL RESPONDENT).

No. 244.

DADABHAI BOMANJI (SPECIAL APPELLANT) v. THE COLLECTOR OF
THANA (SPECIAL RESPONDENT).

*Court Fees' Act VII of 1870, Sections 5 and 7—"Value"—Land in
Salselte—Survey Act (Bombay) I of 1865, Section 35—Ultra vires—
Power of Government to frame rules under the Bombay Survey Act—
Government Land—Building—Prescription—Title.*

The meaning of Clause viii, Section 7, of the Court Fees' Act VII of
1870 is that a person suing to set aside an attachment on land shall in no

case be called upon to pay a higher fee than he would have to pay if he were suing for possession of the land.

Accordingly, in a suit for setting aside a summary attachment, under Bombay Act I of 1865, placed by the Collector on land held on a settlement for a period not exceeding thirty years, the value was held to be five times the assessment, and the stamp duty calculated upon it irrespective of the actual market value, or the amount for which the land was attached.

The holder of a cocoanut oart in Bandora in the Island of Salsette in the Tháná District, paying an annual assessment of Rs. 39 to Government, built a bungalow upon it without the permission of the Collector, who, under the rule purporting to have been issued by the Government of Bombay on the 1st February 1869 in accordance with the provisions of Section 35 of Bombay Act I of 1865, demanded from him a fine equal to sixty times the assessment, and, on the plaintiff's failure to pay the fine, summarily attached the land under the provisions of Section 48 of that Act;—

Held (1st).— That the Government of Bombay had no authority to make the rule of 1st February 1869, and that Section 35 of the Survey Act providing no penalty for building without the Collector's permission, the attachment was illegal.

(2ndly).—That the expressions "Government land" and "Land belonging to Government" in Bombay Act I of 1865 mean land of which Government is the proprietor, and do not apply to land in which the proprietary right in the soil vests in a private individual, whether or not it be subject to the payment of assessment to Government.

(3rdly).—That by virtue of uninterrupted enjoyment for more than thirty years the plaintiff had, under Section 1 of Regulation V of 1827, acquired a prescriptive title to the land, and had become its absolute proprietor.

Quære.—Whether the amount of the fine, contemplated in Section 35 of Bombay Act I of 1865, if not paid, is a charge leviable by summary attachment under Section 48.

THESE were special appeals in the same suit from the decision of W. M. Coghlan, Judge of the District of Tháná, amending the decree of W. H. Crowe, Assistant Judge.

The material facts of the case are as follows:—

The plaintiff occupies a piece of land in the village of Bandora, planted with cocoanut trees and subject to an assessment fixed at Rs. 39 per annum. In 1870 the plaintiff cut down one or two cocoanut trees and built a bungalow, on the site, as he alleged in his plaint, of some chawls or huts and a bakery that formerly stood there. The defendant (the Collector), under Nos. 4 and 8 of the rules framed under Section 35 of Bombay Act I of 1865, and issued on 1st November 1865, inflicted on the plaintiff a fine of thirty times the fixed assessment of the whole survey number, and this fine the Collector doubled under the Supplementary Rules framed under Government Resolution No. 436, dated February

1876

THE COLLEC-
TOR OF
THÁNÁ
v.
DÁDÁBHÁI
BOMANJI.

1876
 THE COLLECTOR OF
 THÁNÍ
 "DÁDAPHÁÍ
 BOMANSÍ.

1st, 1869, in consequence of the plaintiff not having obtained the permission of the Collector before building. The total fine thus levied, therefore, amounted to sixty times the fixed assessment of the entire survey number, viz. Rs. 2,310. This sum not having been paid, the plaintiff's property was summarily attached by the Collector, under Section 48 of Bombay Act I of 1865, and the plaintiff, accordingly, brought this suit, praying to have the attachment removed. The land being valued at five times the survey assessment, viz. Rs. 195, the plaint was stamped with a stamp of the value of Rs. 15, according to the provisions of Act VII of 1870, Section 7, Clause V, Sub-section (d), Proviso (1), Schedule I, No. 1, and Schedule II.

The plaintiff alleged a title to this land dating from 1809, and claimed to be the absolute owner, subject only to the annual assessment, and not a mere occupant of Government land, contending that, even if his tenancy under Government were proved, the Survey Act of 1865 could not have retrospective effect. He also alleged that the bungalow was erected on the site of a building previously in existence on the same spot.

The Collector answered *inter alia* that the plaintiff's bungalow was unconnected with any agricultural purpose, that he had not obtained permission to build it, and had thus rendered himself liable to the fine demanded, that his allegation as to the existence of the previous buildings was incorrect, and that the plaint was improperly valued.

The Assistant Judge held the plaint properly stamped, and that the plaintiff was not liable to the fine imposed by the defendant.

On appeal by the Collector, the District Judge held that the Assistant Judge had used Act VII of 1870, Section 7, Clause 5 (d) (1) as the test to ascertain the value of the land, which in his opinion was incorrect. He looked on the provisions in that section as applicable only to suits for possession, and as not being intended to furnish a test as to whether the amount for which land is attached exceeds its value.

The Judge further held—

"I am unable to see anything in the circumstances of plaintiff's tenure to exempt him as an occupant of Government land from the operation of Section 35 of Bombay Act I of 1865.

"I find that under Section 35 of Bombay Act I of 1865, and the Rules framed under that section, the plaintiff is liable to a fine of thirty times the fixed assessment in the land, Rs. 1,170.

"The penalty imposed is sixty times the assessment, or Rs. 2,340.

"This penalty was imposed under Rules 4 and 8 of November 1st, 1865, under Government Resolution No. 4507, and under the Rule of 1st February 1869 under Government Resolution No. 436.

"The Rules 4 and 8 of 1865 authorize a fine of thirty times the fixed assessment for appropriating land to building sites.

"The rule of 1869 authorizes a fine of double the amount if the land be appropriated without the Collector's permission.

"The provisions of this rule are *ultra vires*. Section 35 of Bombay Act I of 1865 authorizes Government to fix the amount of fine to be paid for this appropriation of land to a purpose not connected with agriculture, but gives no power to Government to fine for failure on the part of the occupant to obtain permission from the Collector. The cause of the fine contemplated in Section 35 is the appropriation of the land, not the failure to obtain permission.

"Judgment for plaintiff for the removal of the attachment to the amount of Rs. 1,170."

The special appeal was heard by MELVILL and KEMBALL, JJ.

Shântárám Náráyan for the defendant Dádábhái Bomanji:—The District Judge was wrong in taking additional stamp duty. In a suit for removal of attachment placed on land paying assessment to Government under the thirty years' settlement, the proper test for ascertaining the market value is that given in Act VII of 1870, Section 7, Clause v (*d*). Clause viii of the same section shows that in no case is the stamp duty to exceed the fee leviable on a suit for possession.

The land on which the plaintiff has built his bungalow is a cocoanut oart, in which there were chawls and a bakery. The bungalow was not the first building upon it; and no one raised any objection while it was under construction. The rule under which the Collector demands the fine, purports to have been issued under the authority of Section 35 of Bombay Act I of 1865; and provides for the infliction of a fine not exceeding double the amount leviable under the rules.

1876
THE COLLECTOR OF
THANÁ
v.
DÁDÁBHÁI
BOMANJI.

1876
THE COLLEC-
TOR OF
THÁNÁ
v.
DÁDÁBHÁI
BOMANJI.

In the first place the Government is not authorized to issue such a rule. See *Rámchandra Bapuji v. Vishnu Bapuji Tindulkar*.⁽¹⁾

And the rule refers to a first appropriation of the land to other than agricultural purposes; the chawals and the bakery having existed before, the present bungalow is not such an appropriation.

The Collector's demand is, therefore, unauthorized, and his attachment illegal. Section 35 of Bombay Act I of 1865 is in the nature of a penal clause, and must be construed strictly. The penalty does not attach till permission to build is asked for, which it never was in this case. The Collector may sue for damages or for an injunction, but he cannot attach.

But the plaintiff has by his uninterrupted occupation of the land become an absolute proprietor; for he is not and never was a tenant of Government land, to which alone Section 34 applies.

Honourable Vishwanáth Náráyan Mandlik, Acting Government Pleader, for the Collector of Tháná :—The plaintiff admits that the land is garden land, and that he pays the ordinary assessment and local and other cesses. The bungalow was undoubtedly built without the Collector's permission, and is not used for any agricultural

(1) Civil referred case No. 8 of 1874, decided by Westropp, C.J., and Larpent, J., 27th July 1875. Bombay H. C. Printed Judgments, 1875, p. 184, not reported. This case does not in fact establish the proposition for which it was cited. It was there decided, on the construction of a document that the plaintiff was not entitled to be repaid by the defendant, his assignee, the amount of the fine recovered by the Collector from the plaintiff, as the immediate tenant under Government, under Sec. 35 of Bombay Act I of 1865, in respect of a building erected for other than agricultural purposes by the defendant without the permission of the Collector, on land sold by the plaintiff to the defendant, and forming part of a survey field held by the plaintiff as occupant. The learned Judges, while pointing out that Section 35 contained no provision that the Collector might impose a fine, in the event of the occupant or any person claiming under him by assignment or otherwise rendering the land unfit for cultivation without the Collector's permission, nor any provision as to the liability of a lessee or assignee of an unrecognized share of a field to recoup the occupant, declined to express any opinion on the question whether the Collector was entitled to levy the fine from the plaintiff, or whether his proper remedy would have been by suit for an injunction against the plaintiff and defendant to restrain them from building or to remove the building.

purposes, but is let out on rent. Section 35 of the Survey Act applies, as also the rule made under its authority. The plaintiff is nothing more than an occupant of Government land. The history of land in Salsette as given in the early Regulations shows that the plaintiff has failed to comply with the conditions under which the Government proposed that the ryots might be made proprietors. The plaintiff is, therefore, not a proprietor but a tenant under Government; and he cannot build as he pleases. It was the plaintiff's duty to ask the defendant's permission before he commenced his buildings, and in not doing so he has clearly violated a law. His claim should, therefore, be rejected with costs.

The judgment of the Court was delivered by—

MELVILL, J.:—In this suit the plaintiff seeks to remove an attachment placed by the Collector of Tháná on a cocoanut oart or garden situated in the outskirts of the town of Bandora in Salsette, which the Collector has attached in order to levy payment of a fine of Rs. 2,340, being sixty times the assessment on the oart, imposed as a penalty in consequence of the plaintiff having built a bungalow in the oart without the Collector's permission.

A preliminary question arises regarding the sufficiency of the stamp upon the plaint. We agree with the Assistant Judge that the stamp is sufficient, and, therefore, the additional amount which the District Judge has levied from the plaintiff must be refunded. Clause viii, Section 7 of Act VII of 1870, prescribes that in suits to set aside an attachment of land, or of an interest in land or revenue, the fee shall be according to the amount for which the land or interest was attached: provided that, where such amount exceeds the value of the land or interest, the amount of fee shall be computed as if the suit were for the possession of such land or interest. The word "value" in the last clause must be construed in the same way as in the previous clauses of the same section, and, therefore, in the case of land held on settlement for a period not exceeding thirty years, and paying the full assessment to Government (which is the present case), the value must be deemed to be a sum equal to five times the survey assessment. The meaning of Clause viii evidently is that a person suing to set aside an attachment on land shall in no case be

1876

THE COL-
LECTOR OF
THÁNÁ
v.
DADÁBHÁI
BOMANJI.

1876
 THE COL-
 LECTOR OF
 THANA
 v.
 DADUPHAI
 BOMANJI.

called upon to pay a higher fee than he would have to pay if he were suing for possession of the land.

We proceed now to consider the merits of the case. The plaintiff holds the land which has been attached under a title which has been proved to extend back, at all events, to the year 1815. In 1869 he commenced to build a bungalow upon it, which was completed in 1871: and towards the close of that year he received a notice that his land was attached and would be sold in satisfaction of a fine of Rs. 2,340, to which he had rendered himself liable by building without having previously obtained the Collector's permission. The authority relied on in support of this proceeding is Section 35 of Bombay Act I of 1865, and certain rules purporting to have been made under that section by the Government of Bombay. Section 35 of Bombay Act I of 1865 is as follows:—

“It is hereby declared that an occupant of any Government land is entitled, in virtue of his occupancy, to erect farm buildings, construct wells or tanks or make any other improvements thereon for the better cultivation of the land. But if an occupant wishes to appropriate the land in his occupancy to any purpose unconnected with agriculture so as to destroy or injure it for cultivation, he shall first obtain the Collector's permission, which shall be given on payment of a fine fixed according to such rules as may from time to time be prescribed under the orders of the Governor in Council, and on entering into a written agreement to pay, in addition to such fine, the annual assessment which may have been fixed on such land at the settlement then current, and which shall remain liable to revision at any future settlement of the district.”

The rules prescribed by the Government of Bombay under this section will be found at pages 123 and 124 of Mr. Naine's Revenue Hand-book. They are dated 1st November 1865, and fix the fine to be paid under Section 35 at a certain rate per acre, or at thirty times the fixed assessment, whichever of the two may be the greater. Subsequently on the 1st February 1869 the Government promulgated another rule, which is as follows:—

“In cases where the occupant has diverted his land to other than agricultural purposes without having obtained the permission required by the rules, he is liable to a fine not exceeding double the amount leviable under the rules.”

It is under this last rule that the Collector has made the plaintiff liable to a fine of sixty times the assessment. We agree with the District Judge that it was not within the power of the Government of Bombay to make such a rule. Section 35 of the Act declares that a person wishing to apply his land to certain purposes must first obtain the Collector's permission and must pay a fine; but it is silent as to any penalty for making such an application of the land without having obtained permission. This may have been an oversight on the part of the Legislature; though it is difficult to think that the omission was accidental seeing that in a preceding and a subsequent section (Sections 33 and 39) care has been taken to provide an express penalty for the unauthorized appropriation of certain lands. More probably, it was considered that the Collector would have an adequate remedy in an injunction of the Civil Court against any one who might commence building without permission, or in a suit for the removal of the building, or for damages. However this may be, it is certain that no penalty has been prescribed by Section 35 of the Act, and that the Governor in Council has not been authorized to make a rule on the subject.

1876
THE COL-
LECTOR OF
THANÁ
v
DADIBHAI
ROMANJI.

It follows that the attachment placed by the Collector was in pursuance of an authorised demand, and we might on that account at once order it to be set aside, leaving the Collector to pursue any other remedies which he may have against the plaintiff.

But we think that, if the plaintiff is liable to the payment of any sum of money on account of the building of his bungalow, it is not desirable that we should raise the attachment, without insisting that such sum of money should be first paid. Such a proceeding would be beneficial to neither party. If Section 35 of Act I of 1865 be applicable to the case, then the plaintiff was certainly bound to pay the fine therein prescribed before he commenced building:—and though it may be doubtful whether, if the Act be construed very strictly, such a fine, not having been paid, is a charge leviable under the Act (within the meaning of Section 48) by a summary attachment, yet it is certain that the Collector could recover it, together with costs, in a suit for damages, and could then attach the plaintiff's land and house in the ordinary course of civil procedure. Under these circumstances it is better

1876
THE COL-
LECTOR OF
THANÁ
v.
DÁDÁBHÁI
BOMANJI.

for both parties that we should decide that which is the substantial question at issue between them, viz, whether the plaintiff is liable to any, and what, fine under the provisions of Section 35 of Bombay Act I of 1865.

That section is in terms applicable only to occupants of Government land; and the first question which arises is, what is meant by "Government land." It is hardly to be supposed that the word "Government" is mere surplusage, and that the expression "any Government land" is equivalent to "any land." It is rather to be inferred that the term applies to a particular description of land, to the exclusion of land of a different description. This supposition is borne out by a reference to Section 11 of the Act, which authorizes Survey Officers to enter "any lands, whether belonging to Government or to private individuals, and whether assessed to the public revenue or partially or wholly exempt from assessment." The "Government land" spoken of in Section 35 is, we think, the same thing as "land belonging to Government" spoken of in Section 11, and must be understood as used in the same sense of contra-distinction to land "belonging to private individuals." And it is also clear from the words quoted from Section 11 that the distinction between Government land and land belonging to private individuals is not to be sought in the payment or non payment of assessment. The distinction, therefore, which is intended, must, we think, have reference to the proprietary rights in the soil: and the expressions "land belonging to Government" and "Government land" can only mean land of which Government is the proprietor, and do not apply to land in which the proprietary right in the soil vests in a private individual, whether or not it be subject to the payment of assessment to Government. This appears to us to be the only method of construing the Act consistently with itself; and it is, moreover, a very reasonable construction of Section 35, taken by itself: for it can hardly be supposed that the Legislature intended to restrict the full enjoyment of his own land by an absolute proprietor of the soil.

It is not necessary for us to discuss the much-vexed question, whether from an historical point of view the land in India is to be regarded as originally the property of the State or of indivi-

duals, and whether the State dues are a rent or a tax. That question is not now of much practical importance, seeing that every occupant of a field has his right of conditional occupancy guaranteed to him by the Survey Act as a transferable and heritable property. No doubt the preamble of Regulation III of 1814 declared that "the ruling power of the provinces now subject to the Government of Bombay has, in conformity to the ancient usages of the country, reserved to itself, and has exercised the actual proprietary right of lands of every description." The correctness of this statement is very questionable. The reports of Elphinstone, Chaplin, Grant Duff, Robertson, and others, indicate very clearly that a large portion of the ryots, and specially the mirasdars, are, according to the ancient usage of the country, proprietors of their estates, subject to the payment of a fixed land-tax to Government. The subject will be found discussed at considerable length in *Sooryabhan v. Bukajee and another*.⁽¹⁾ But, at any rate, the statement in the preamble of Regulation III of 1814 is consistent with the alienation of its proprietary rights by Government, or with its recognition of the existence of proprietary rights in individuals, in particular instances, whether before or subsequently to the Regulation. It is also consistent with the capacity of private individuals to acquire proprietary rights by possession adverse to the Government, as prescribed in the subsequent Regulation V of 1827, or any other law of prescription or limitation. It is, therefore, open to us to consider whether the plaintiff has, either by alienation, recognition, or proscription, acquired a proprietary right in his land.

The early history of the revenue administration of Salsette is given in great detail in Regulation I of 1808. From this it appears (Section 20) that in the year 1788 it was proposed by Mr. Farmer, the officer locally in charge, "to encourage persons to pursue the cultivation and general improvement of the Company's villages, by ensuring to them and their heirs for ever the fruits of their labour and expense, and at the same time securing to the Company, as lords of the soil, a fair participation in these improvements, so as, in his idea, to convert the system of needy adventurers and temporary farmers into one of permanent zemindars." Some discussion on the part of the Government of

⁽¹⁾ 2 Morris, Rep. 189

1876

THE COL-
LECTOR OF
THANÁ
"DADABHÁI
BOMANJI.

1876	Bombay and the Court of Directors followed this proposal: and
THE COL-	in 1791 the Governor-General directed further inquiry to be
LLECTOR OF	made, as to whether the property in the soil was vested in the
THANA	Company or in the occupants, subject only to their payment to
"	Government of the toka, or moiety of the crop. The inquiry was
PAḌĀLI (made, and certain temporary changes were introduced in the re-
BOMANJI.	venue system; but the result not being satisfactory, Mr. Rivett
	Carnac (who had succeeded Mr. Farmer) recommended in 1796
	that the Government share in the crop should be reduced from
	one-half to one-third (Section 23), and, as a further and necessary
	incentive to the projected improvement, Mr. Rivett Carnac sug-
	gested that "the Coorumbes" (Koonbees) "should be admitted
	to a defined and certain interest in the land they respectively
	cultivate, their occupancy having hitherto been understood to be
	founded rather on prescriptive than positive right; for removing
	all doubts respecting which, it should be publicly signified to the
	ryots that the perpetual possession of the property held by their
	forefathers would be secured to them by written deeds as long as
	they continued to pay the rent to be settled for their respective
	local extent of cultivation" (Section 21). These proposals met
	with the entire approbation of the Supreme Government, as
	expressed in their letter of the 27th January 1797, which included
	likewise their recommendation "that the privilege of selling or
	transferring their lands should be conferred on the Coorumbes
	as the hereditary proprietors of their respective occupancies,
	under such rules and restrictions as the Government of Bombay
	might judge proper to prescribe for the security of the public re-
	venue: the principle of which was, to continue to rate the fixed
	demp-jara part of the rental in grain instead of money, for the
	purpose of guarding against the gradual diminution in value of
	the precious metals" (Section 31). The Court of Directors were
	pleased to signify, under date the 20th March 1799, their con-
	currence in these proposals, as having for objects "an increase of
	the revenues, a decrease in the expense, and an amelioration in the
	condition of the inhabitants." The result was that the new system
	was introduced in 1798: that system being that, as regards the
	rice lands, which constituted almost the whole of the cultivated
	land in Salsette, the cultivators were to pay a fixed assessment,
	computed in grain at one-third of the average crop; a wise precau-

tion being introduced (which has unfortunately been abandoned in later settlements), that if the grain assessment should be commuted for cash payments, there should be decennial valuations for the purpose of guarding against the gradual diminution in the value of silver. On the 1st May 1801 the Government of Bombay again signified its acquiescence in the principle of this arrangement, and declared that the cultivators were henceforward to be the full proprietors of their respective tenures (Section 41), and shortly afterwards the Governor in Council issued a proclamation (Section 43) in which he made known "for the particular information of the inhabitants of Salsette that, in pursuance of his determination, communicated to them on the 12th June last, to ameliorate their situations, by rendering them perpetual proprietors of the soil they now occupy, under a very moderate and fixed rent payable to the Government, formal grants of the property in question will be issued through the Collector, under the seal of the Company and signature of the Secretary to Government, to such present occupants of the soil in Salsette as may be desirous, and shall, in consequence, make application to the Collector on the spot, or to the Government of Bombay, to obtain them." From Section 45, Clause 3, it appears that only four persons actually availed themselves of the deeds offered to them, the reasons being thus stated—"How favourable so ever these deeds of property were esteemed in prospect, yet, from several causes, only four have been actually taken out, the Natives being under the less inducement to apply for them, or to pay the fee of five rupees, which had, since the 30th of September 1806, been established on each, that *they have continued undisturbedly in possession of all the advantages derivable from them*: whilst, on the other hand, they have had in object to obtain a modification of them, by rendering the present decennial valuation of perpetual batty-rental as permanent as is become that revenue in kind; * * * * * added to all which not a few of the Coorumbees remain attached to the ancient practice of their forefathers, and are apprehensive of binding themselves to a specific revenue by positive engagements, where, from circumstances of season joined to their own limited means, they might prove unable to withstand such casual disadvantages."

The Assistant Judge, referring to the proclamation and to the form of deed given in Section 44 of the Regulation, observes that

1876

THE COL-
LECTOR OF
THÁNÁ
v
DÁDÁBHÁI
BOMANJI.

1876
 THE COL-
 LECTOR OF
 THANÁ
 v
 DÁDÁHÍ
 BOMANJI.

there is nothing in the present case to show that the plaintiff ever accepted the conditions offered, and that his tenure is different to that of any other occupant of Government land, nor that he possesses any grant entitling him to any privilege or exemption. In this view the District Judge appears to have concurred

Now it appears to us that both the Assistant Judge and the District Judge have fallen into an error in holding that the plaintiff is prejudiced by the non-acceptance of a title-deed. Whether, if a deed had been offered to him and refused, such a result would have followed, as the Courts below suppose, it is not necessary for us to determine; though we may remark that the words italicised in the passage quoted above from Section 45 of the Regulation, and other portions of the same Regulation, show clearly enough that the non-acceptance of the deeds was not at the time considered either by the cultivators or by the Government as in any way working a forfeiture of the rights and privileges which had been bestowed or offered. But, in fact, there is nothing to show that title-deeds were ever offered to persons in the position of the plaintiff. It is true that the Government's proclamation purported in the first paragraph to be addressed generally to "the inhabitants of Salsette;" but it is clear from paragraph 3 of the proclamation, and from the form of the title-deeds given in Section 44 of the Regulation, that the title-deeds were intended to be given only to the cultivators of *batty* or rice land. If there be any doubt on this subject, it is at once removed by Section 42, which informs us that, "under date the 18th of July 1801, the Collector reported his having given the most public notice of the rates fixed for the receipt in money of the batty revenues for ten years, transmitting at the same time drafts of the deeds of property to be interchanged with all possessors of batty ground paying revenue or quit-rent, and a list of those occupants of the soil to whom these deeds should be applicable, to the number altogether of ten thousand four hundred and sixty-nine, of whom thirty-six were distinguished as immediately desirous of availing themselves of the grants in question." The form of these deeds having been approved by the Government, they were returned to the Collector, with copies of the proclamation, to be disseminated for the general information of the inhabitants (Section 43). It

appears, therefore, that the title-deeds were intended for a specified number of possessors of batty ground, and there is nothing in the Regulation to show, or even to suggest the idea, that similar title-deeds were offered to the occupants of cocoanut oarts. These oarts had always been, and continued to be, dealt with on a different system from that applied to batty ground. This system is described in Section 40, from which it appears that the Marathas had observed the practice of taxing the oarts at seventeen and fifteen rupees per bega, from which they deducted twenty-five per cent. for the ground occupied by wells, tanks, houses, and unproductive spots. Mr. Rivett Carnac proposed, under date the 23rd of April 1800, to reduce the rate to twelve rupees per bega, "a modification which, leaving the rental still higher than *the proprietors* could afford to pay as a net permanent assessment," the following rules were, under date the 2nd of January 1807, prescribed to the Collector for his guidance in respect to the oart assessment :—

"Those that were rated by the Maratha Government at the gross amount of seventeen rupees per bega, to be now assessed at the rate of ten rupees per bega, without further plea or deduction in the whole measured extent, *however occupied*.

"Those that were rated by the Maratha Government at the gross amount of fifteen rupees, to be now assessed at the rate of eight rupees and a half per bega on the whole measured extent, *however occupied*."

The section goes on to say that these rates had been extended over the Island : and that some oarts having devolved to the Company, as well as certain baghat or gardens, these descriptions of tenure were, on the 1st of May 1801, ordered to be sold, subject to a fixed quit-rent in perpetuity, as accordingly took place on the 15th of July following, the rent on the gardens being fixed at two and a half rupees, and on the oarts at twelve rupees per bega, which rate was afterwards altered to those specified in the rules above quoted.

From the statements contained in the above section it appears that the terms granted to the possessors of cocoanut oarts were in every respect to their advantage. The cultivators of batty ground had, as we have seen, been deterred from accepting title-

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1876

THE COL-
LECTOR OF
THANÁ
v.
DÁDÁBHÁI
BOMANJI.

1876
 THE COL-
 LECTOR OF
 THÁNÁ
 v
 DÁDÁBHÁI
 BOMANJI.

deeds, some of them because they desired a fixed money assessment, and others because they dreaded any kind of fixed assessment. These deterrent causes could have had no operation in the case of the holders of the oarts. These oarts had always been rated at a fixed money assessment: and the only effect of the changes introduced in 1800 and 1807 was to reduce that money assessment, and to increase the security of the tenure. If then title-deeds had been offered to the holders of oarts, there can be little doubt that they would all have accepted them gladly. That they did accept the favourable terms offered to them, there can be no doubt. The plaintiff's position, therefore, is quite unaffected by any prejudice arising from a supposed omission on the part of those through whom he claims to avail themselves of the terms offered to them by the Government.

What, then, is that position? From Section 40 of the Regulation it appears that from 1800 until 1808 (the date of the Regulation) the occupants of oart were treated as "proprietors," and that in 1807 the assessment was fixed on the whole extent of the oarts "however occupied." It is clear from the whole tenor of the Regulation that the word "proprietors" in Section 40 is used advisedly and in its strict sense. It has been stated in the course of the argument, and not contradicted, that no change whatever was made in the relations between the Government and the holders of the oarts, nor in their assessment, between the years 1808 and 1861, when the new survey was introduced. It is certain from Captain Francis' Report, No. 74 of 13th February 1861,⁽¹⁾ that the assessment of two and a half rupees on gardens (the rate mentioned in Section 40 of the Regulation) had remained unchanged during the whole of that period: and there is no reason to suppose that it was otherwise in regard to the assessment on the oarts. But this is of little consequence. The assessment on land may be varied without any disturbance of proprietary rights. What is of importance is that the plaintiff and those through whom he claims have held as proprietors and without dispute from 1815 till 1869, or for more than 50 years. It is not necessary to say that the rules set out in Regulation I of 1808 created such an indefeasible proprietary title that the Government could not subsequently have

(1) Bom. Govt. Records, No. XCVI N. S. p. 312.

disputed it. It may be that Government could have done so; but in fact it never did. For a period very much exceeding thirty years it continued to recognise the validity of those rules. It had by its Regulation told the holders of the oarts that they were proprietors. It never asserted that they had ceased to be proprietors. They continued to regard themselves and to be regarded as proprietors. Consequently, in the words of Section 1, Regulation V of 1827 (which was in force when this suit was brought), they held their lands as proprietors, and such possession for a longer period than thirty years must, according to the provisions of that section, be received as proof of a sufficient right of property.

For these reasons we are of opinion that the plaintiff has, under Section 1 of Regulation V of 1827, acquired a right of property in his oart, subject only to the payment of assessment to the Government; that the land is not Government land, within the meaning of Section 35 of Bombay Act I of 1865; that the plaintiff is not liable to pay any fine or penalty for building in the said oart without the Collector's permission; and that, consequently, the attachment of the oart by the Collector is illegal, and must be set aside.

We reverse the decree of the Court below, and restore that of the Assistant Judge, placing all costs on the Collector throughout.

PRIVY COUNCIL.

July 13, 15, 20, 1875.

February 16, March 28, 1876.

PRESENT.

The Lord CHANCELLOR (Lord CAIRNS).	SIR BARNES PEACOCK.
LORD SELBORNE.	SIR MONTAGUE E. SMITH.
SIR JAMES W. COLVILLE.	SIR ROBERT P. COLLIER.

IN APPEAL FROM THE HIGH COURT OF JUDICATURE AT BOMBAY.

DAMODAR GORDHAN, DEFENDANT, *v.* DEORAM KANJI*

(DECEASED, BY HIS SONS AND HEIRS), PLAINTIFF.

British territory in India, Power to cede—Proof of cession—Transfer of jurisdiction—Re-arrangement of jurisdiction within British territory—Statutes 3 & 4 Will. IV, Cap. 85, Section 43; 24 & 25 Vic., Cap. 67.

* On account of the very great importance and interest of the point of Constitutional Law discussed in this case, and the circumstance that it is not the point on which the judgment turns, it has been thought more instructive to give a very full report of the arguments of Counsel and interpellations of the Committee.

1876

THE COL-
LECTOR OF
THANÁ
v.
DADÁBHÁI
ROMANJI.

1876

DÁMODAR
GORDHAN
v.
DEORÁM
KÁNJI.

Section 22; and 24 & 25 Vic, Cap. 104, Section 9—*The Indian Evidence Act of 1872, Section 113—Territorial Jurisdiction of British Court ceases on cession*

Semble that the general and abstract doctrine laid down by the High Court at Bombay that it is beyond the power of the British Crown, without the consent of the Imperial Parliament, to make a cession of territory within the jurisdiction of any of the British Courts in India, in time of peace, to a foreign power, is erroneous.

Where an objection is taken to the territorial jurisdiction of a British Court, on the ground that the territory over which the jurisdiction of the Court extended has been ceded to a foreign power, such a cession must be regularly proved and cannot be established by uncertain inferences from equivocal acts.

An agreement on the part of the Government of India purporting to transfer certain villages forming part of a Regulation Province within the Bombay Presidency, and subject to ordinary British jurisdiction, to the extraordinary jurisdiction of the Political Agency of a Native State, does not constitute a cession of territory.

A re-arrangement of jurisdiction within British territory in India by the exclusion of a certain district from the Regulations and Codes therein force, and from the jurisdiction of all the High Courts, with a view to the establishment therein of a Native jurisdiction under British supervision and control, cannot be carried out except by legislation under the provisions of the Imperial Statutes 3 and 4 Will IV, Cap. 85, Section 43, 24 and 25 Vic, Cap. 67, Section 22, and 24 and 25 Vic, Cap. 104, Section 9.

The Governor-General in Council being precluded by the Act 24 and 25 Vic, Cap. 67, Section 22, from legislating directly as to the sovereignty or dominion of the Crown over any part of its territory in India, or as to the allegiance of British subjects, cannot by any legislative Act (e.g., by "The Evidence Act of 1872," Section 113) purporting to make a notification in the *Government Gazette* conclusive evidence of a cession of territory, exclude judicial enquiry as to the nature and lawfulness of that cession.

Where the foundation of the jurisdiction of a British Court over the subject-matter of a suit and the parties thereto is territorial, and the territory by valid cession ceases to be British, the jurisdiction of the Court can no longer be exercised whatever be the stage or condition of the litigation at the time of such session.

THE facts of the case in which this appeal was brought are as follows:—

On the 3rd September 1864, Deorám Kánji, whose representatives are the respondents in this appeal, an inhabitant of the village of Gangli, filed a plaint in the Court of the Munsif of Gogo against Dámodar Gordhan and others to redeem certain land, situated in the village of Gangli, which he alleged he had mortgaged in the year 1812 to one Hárnath, the father of Dámodar, to secure a debt of Rs. 60. At the date of the institution of this

in the zillah of Ahmedabad, in the Bombay Presidency, and was admittedly subject to the jurisdiction of the Ordinary Civil Courts of that Presidency. The defendants denied the mortgage, maintaining the transaction to have been one of absolute sale; but the Munsif, holding the mortgage to be proved, on the 19th April 1865 gave a decree for the plaintiff. The defendant appealed, and on the 18th January 1866 the Munsif's decree was reversed by the Assistant Judge of Ahmedabad. On a special appeal by the plaintiff to the Bombay High Court, the case was on the 12th December 1866 remanded to the Court of Ahmedabad for re-trial; and the Judge of Ahmedabad having re-heard the case, by a decree dated the 11th August 1869, affirmed the original decree of the Gogo Munsif. From this decision the defendant preferred a special appeal to the High Court, contending that the Judge of Ahmedabad had no jurisdiction to deal with the case on remand, inasmuch as the village of Gangli, in which the land in dispute lay, had previously been removed from the Ordinary Civil Courts of the Bombay Presidency. In support of this contention the defendant relied on the following notification dated the 29th January 1866, and published at page 197 of the *Bombay Government Gazette* of that year:—

1876

DĀMODAR
GORDHAN
v
DEORĀM
KĀNJI.

“Revenue Department.

“It is hereby notified that, in accordance with a convention made between His Excellency the Governor of Bombay and His Highness the Thakore of Bhaunagar, the undermentioned villages belonging to the Thakore of Bhaunagar, and situated in the purgunnah of Dhandhuka, Ranpore and Gogo, Zillah Ahmedabad, are from and after the 1st of February 1866, Samvat 1922 Māgha Vadya 2nd, removed from the jurisdiction of the Revenue, Civil, and Criminal Courts of the Bombay Presidency, and transferred to the supervision of the Political Agency in Kattywad, on the same conditions as to jurisdiction as the villages of the taluka of the Thakore of Bhaunagar heretofore in that province.

By order,

F. S. CHAPMAN,

Chief Secretary to Government.

· Bombay Castle, 29th January 1866.”

1876

DĀMODAR
GORDHAN
v.
DEORĀM
KĀNJI.

The village of Gangli was one of the "undermentioned villages" referred to in this notification. On the 2nd December 1870 the defendant's appeal was rejected by the High Court. The Court observed that, under Act VI of 1859, the village of Gangli was within the purgunnah of Gogo, which purgunnah, under Section 16, Regulation II of 1827, forms a part of the zillah of Ahmedabad in the Bombay Presidency, and that no law had been shown by which power was conferred on the Governor in Council to remove any part of the territory of the Bombay Presidency from the jurisdiction of the Ordinary Courts, or to interfere with the jurisdiction of the High Court established by Section 1, Regulation II of 1827, and 24 and 25 Vic, Cap. 104, Section 9. That, assuming that the Governor in Council had power under Clause 2, Section 16, Regulation II of 1827, to cede territory, he had no authority in the face of Section 6, Regulation I of 1827, summarily to abrogate any law in force in such territory; and, consequently, that the notification relied on by the defendant was of no effect whatever to destroy the jurisdiction of the Ahmedabad Court.

The defendant subsequently applied to the High Court to review their judgment on the grounds: (1) —That the Court had been wrong in holding that the Ahmedabad Judge had jurisdiction to decide the case. (2).—That since the decision of the case the petitioner had obtained from Government additional evidence to show that the village in question was removed from the jurisdiction of the Civil Courts, and transferred to Bhaunagar by the Government of Bombay, with the consent and sanction of the Governor-General of India in Council and the Secretary of State, and, consequently, that the Bombay Government had authority to do as it had done.

With the petition of review the following documents were filed:—

1. Copy of a letter from the Secretary of the Foreign Department of the Government of India to the Acting Secretary of the Government of Bombay, dated the 31st May 1865, in these terms:—

"I have the honour to acknowledge the receipt of your letter dated 10th instant, No. 80, forwarding copy of a communication from the Thakore of Bhaunagar, asking for an early settlement of the arrangements entered into with him by Sir George Clerk."

"2.—The Thakore's present application is understood to refer to the contemplated transfer of the town of Bhaunagar, of the district of Sehore, and of the villages in Dhandhuka and Gogo, to the supervision, laws, and regulations of the Kattywad Political Agency.

1876

DAMODAR
GORDHAN
v
DEORAM
KANJI.

"3.—His Excellency in Council observes that this matter, in common with the general question of the future administration of Kattywad, was referred for the final consideration of the Bombay Government in my predecessor's letter No 132, dated 13th February 1865. As Her Majesty's Secretary of State for India has decided that Kattywad is not British territory, the projected transfer will have been legalized by the agreement concluded between Sir George Clerk and the Thakore, which subsequently received the sanction of the Secretary of State, with the reservation that, in the event of gross misconduct on the part of the Thakore, these territories shall revert.

"4.—His Excellency in Council authorizes the contemplated arrangement being at once carried into effect. The Government of Bombay will be judges of what shall constitute gross misconduct, and will be careful to append to the original agreement a stipulation embodying the Secretary of State's reservation upon that point."

2. Copy of a Resolution of the Revenue Department of the Government of Bombay, dated 28th January 1871 :—

"RESOLUTION.—Her Majesty's Government, in concurrence with the opinions of the Law Officers of the Crown, have decided that the Government of India has power to cede territory to Native States, and 'is the sole judge of the considerations of State policy by which grants of territory must be determined.' The cession of certain villages in the Gogo, Dhandhuk, and Ranpur purgunnahs, from British territory to the jurisdiction of the Thakore of Bhaunagar, was directed to be made by the Government of India. Amongst these is the village of Jangli, situated in the Purgunnah of Gogo of the Ahmedabad Zillah."

3. An extract from the proceedings of the Government of Bombay in the Revenue Department, dated 4th April 1870 :—

"The Viceroy and Governor-General in Council has considered with much attention the important papers forwarded with the

1876
DANODAR
GORDHAN
v.
DEORAM
KANJI

Resolution of the Bombay Government in the Revenue Department, No. 3, dated 3rd January 1870, and desires me to convey to you the following observations for the information of His Excellency the Governor of Bombay in Council.

"2.—The Governor-General in Council, as at present advised, is of opinion that a legislative Act of the Government of India is not required to give effect to the arrangements made between the Bombay Government and the State of Edar and sanctioned by the Secretary of State.

"3 —Her Majesty's Government, in concurrence with the opinion of the Law Officers of the Crown, have decided that the Government of India has power to cede territory to Native States, and 'is the sole judge of the consideration of State police by which grants of territory must be determined.' It is a necessary inference from the possession of this power that no act of any Legislature is necessary to give effect to such a fact. The jurisdiction of British Courts must cease as soon as the territory over which it was exercised ceases to be British territory.

"4.—The only question which can possibly arise is whether the Indian Courts would recognize the validity of the arrangement if it ever came before them; and on this point His Excellency in Council does not see how the question of the validity of such a cession of territory could come before the Courts, or, in the event of their refusal to recognize it, how any decree which they might give as to land or property could be executed outside of British Government.

and, consequently, the arrangements with the Edar State, however, of which do as it has been received by the Governor-General in Council.

With the copy of the despatch from the Bombay Government to the Secretary of State, No. 21, dated 6th July 1869, forwarded.

1. Copy of Department with your No. 2784, dated 8th idem, in which the Government of the Edar State is stated not to have been made without the previous sanction of the Government of India. They are in substance a transfer of territory on the following terms:—

"I have the honor to inform you that each party transfers to the other certain rights of territory. But it is provided by Section 43, that the Governor of Bombay shall not conclude any treaty with any Indian prince without the sanction of the Secretary of State."

of State without the authority of the Governor-General of India in Council or of the Court of Directors, for which that of the Secretary of State is now substituted.

1876
DĀMODAR
GORDHAN
v.
DĠORĀM
KĀNJI.

“6.—The defect arising from the want of previous sanction may be considered as cured by the subsequent sanction which the Secretary of State has extended to the transaction in his Revenue despatch to the Bombay Government, No. 67, of 16th September 1869. But I am to point out that it would have been more in accordance with the requirements of the law if the proposed arrangements had been previously submitted for the orders of His Excellency the Viceroy and Governor-General in Council, and I am to request that this course may in future be pursued before any such negotiations are entered on with any Indian Prince or any Foreign State or Power.”

On the 1st September 1872 “The Indian Evidence Act” came into operation, Section 113 of which contains the following provision:—

“A notification in the *Gazette of India* that any portion of British territory has been ceded to any Native State, Prince, or Ruler, shall be conclusive proof that a valid cession of such territory took place at the date mentioned in such notification.”

On the 4th January 1873 a notification appeared in the *Gazette of India* in these terms:—

“The Governor-General in Council hereby notifies the fact that the villages mentioned in the schedule here below appended were, on the 1st of February 1866, ceded to the State of Bhaunagar.” Gangli was among the villages mentioned in the schedule.

On the 16th December 1872, the Bombay High Court passed an order admitting the application for review on the ground that it had been shown that a transfer of the village of Gangli from British to foreign territory had been made by order of the Government of India, with the sanction of the Secretary of State, under powers conferred by the Statute 21 and 22 Vic., Cap. 106, Section 3. After re-hearing the case the High Court, on the 24th March 1873, pronounced the following judgment, in which they confirmed their original decision of the 2nd December 1870:—

1876
DĀMODAR
GORDHAN
v.
DEORĀM
KĀNJI.

"The question of jurisdiction has now been formally argued before us

"The appellant's arguments, put shortly, amount to this: that the right to cede territory was vested in the Court of Directors in concert with the Board of Control, who had power to acquire territory and to make treaties with foreign princes, to which right the Secretary of State for India succeeded under the provisions of Section 3, Chap. 106, of 21 and 22 Victoria; that this Court, under Section 57, Chap. 106, of the Indian Evidence Act, was bound to accept the territorial alterations notified in the proclamation in the *Bombay Government Gazette*, and further that this Court, being bound by the law, cannot but hold the cession to be valid under Section 113 of the same Evidence Act, coupled with a notification in the *Gazette of India*, 4th January 1873, as follows:—'The Governor-General of India in Council hereby notifies the fact that the villages mentioned in the schedule here below appended were, on the 1st February 1866, ceded to the State of Bhaunagar' (the village of Gangli being included in the same schedule).

"Whereas on behalf of the respondent it was urged with much force and ability that the power to cede territory, and therewith to transfer the allegiance of subjects, was never possessed by the Court of Directors, and, therefore, could not be transferred to the Secretary of State, such power residing in the Imperial Legislature alone; that therefore the cession was invalid, and the recent notification in the *Gazette of India*, made for the purposes of Section 113 of the Evidence Act, was worthless, it being *ultra vires* of the Legislative Council, as in various ways in defiance of Acts of Parliament; that the Legislature had no power to make retrospective laws; and, lastly, that even though the question of jurisdiction be decided against the respondent, the appellant, having already attorned to the jurisdiction, cannot now be heard to object.

"With regard to attorning to the jurisdiction, the respondent's argument appears altogether untenable; it is advisable, therefore, at the outset, to dispose of that question. Certain English cases have been quoted to us in support of the contention that a suit can be carried on, within British jurisdiction, as regards land in foreign territory, but none of those cases go to the length of

showing that parties out of the jurisdiction can litigate in a British Court to recover land situated out of British territory, and they clearly have no application to the present case. It is manifest that the acts and conduct of parties cannot of themselves give any Court a jurisdiction not before possessed over the subject-matter in dispute; and it is also manifest that, if the legal effect of the cession of territory notified was to remove the village of Gangli out of the jurisdiction of the District Court of Ahmedabad, Sections 3 and 37, Act XXIII of 1861, provided an absolute bar to the Judge's hearing this appeal.

"Two main questions arise in this case: one, as to the effect of the declaration in the *Gazette of India*, in January last, that territory has been ceded; and the other as to the validity and legality of the cession itself.

"The power of the Indian Legislature to create such a statutory presumption having been challenged on the ground that it affects the authority of Parliament, we find that the first of these questions involves an enquiry into the very serious one of the Crown's prerogative to cede territory.

"We prefer, then, first to consider, with regard to the second question, what rights for cession of territory were vested in the East India Company; for it is clear that only those powers which the Company possessed, 'either alone or by the direction and with the sanction of the Commissioners of the affairs of India,' devolved upon Her Majesty's Secretary of State.

"We know that from the time of their first charter, granted by Queen Elizabeth in 1600, down to 1767 the Company were merely recognized as traders; but as their struggles with the French Company left them, at the peace of 1763, masters of a large portion of territory, their position attracted the attention of Parliament, and the House of Commons appointed a Committee to enquire into the nature of the Company's charters, the enquiry resulting in their being continued by 7 George III, Ch. 57, Section 2, in possession of their territorial acquisitions and revenues, as well as their exclusive trade, until the 1st of February 1869, on condition of the payment of a certain annual sum.

"From this date the Company's exclusive trade and Government were renewed from time to time, until by 3 and 4 William IV,

1876

DÁMODAR
GORDHAN
v.
DEORÁM
KÁNJI.

1876
 ———
 DAMODAR
 GORDHAN
 v
 DILORAM
 KANJI

Ch. 35, their trade was suspended, except in so far as it might be carried on for purposes of Government, their term of government being continued until the 30th of April 1851, and, finally, this term was renewed 'until Parliament should otherwise provide,' until in fact the passing of 21 and 22 Victoria, Ch. 106, which transferred the Government of India to Her Majesty.

"We see, then, that from the year 1767, when the East India Company's territorial acquisitions were first recognized as British territory, they were, from time to time, continued in possession of them, subject to the authority of Parliament

"It is alleged that the Company, in concert with the Board of Control, had power to acquire territory, and to make treaties with foreign princes, and it is argued that they must have had power to cede territory also for the purposes of such treaties; but we see clearly that whatever powers the Company and Board possessed, were derived from Parliament. All the charters from 1767 expressly entrust the Company with possession and Government of the British territories, and appropriation of the revenues (as a necessary means of governing) for the Crown; and the Board of Commissioners was created with 'full power and authority to superintend, direct, and control all acts, operations, and concerns which in anywise relate to or concern the Civil and Military Government and Revenues of the said territories and acquisitions in the East Indies.' And though it may be inferred that the Company and Board had power to levy war or make peace and to make treaties with Native princes and states in India for guaranteeing their possessions, nowhere are we able to find any indication of an authority to dismember already existing British territories. On the contrary, it is a significant circumstance that Parliament expressly provided the Court of Directors with power, under the direction and control of the Board of Commissioners, to 'declare and appoint what part or parts of any of the territories under the Government of the Company should from time to time be subject to the Government of each of the several Presidencies then subsisting or to be established, and to alter from time to time the limits of the Presidencies and Lieutenant-Governorships.' If, therefore, special enactments were necessary to enable the Government of the country to make internal arrange-

ments and distributions of British territories, *à fortiori* would it appear that without such special enactment they were incompetent to cede any portion of them.

“Mr. Forsyth in his ‘Cases and Opinions on Constitutional Law,’ page 185, gives two instances of cession (not under treaty of peace) by the East India Company to a foreign state previous to 1858:—

“‘1.—In 1817, a cession by treaty in full sovereignty to the Sikhumputtee Rajah of a part of territory formerly possessed by the Rajah of Nepaul, but ceded to the East India Company by a treaty of peace.’

“‘2.—In 1833, a cession by treaty to Rajah Uoorunder Singh of a portion of Assam, lying on the south of the Brahmaputtrá River, by which the Rajah bound himself, in the administration of justice in the country now made over to him, to abstain from the practices of former Rajahs of Assam as to cutting off ears and noses, extracting eyes, and otherwise mutilating and torturing.’

“Alluding to the latter case, Mr. Forsyth adds: ‘This is not a very satisfactory precedent, and it shows the kind of risk to which British subjects might be liable on being transferred to a semi-barbarous Power.’

“And certainly these two isolated cases furnish no sufficient presumption of the existence of a prerogative of which we cannot find any trace in any of the various Acts defining the Company’s status and powers.

“Holding, then, that the power to cede territory was not one of the powers to which the Secretary of State succeeded under the Act transferring the Government of India to Her Majesty, we turn to consider the effect of the *Gazette of India* notification.

“Section 113 of the Evidence Act, which received the assent of the Governor-General on the 15th March 1872, runs thus: ‘A Notification in the *Gazette of India* that any portion of British territory has been ceded to any Native State, Prince, or Ruler, shall be conclusive proof that a valid cession of territory took place on the date mentioned in such Notification.’

“This section was first introduced in the amended Bill presented, on the 30th of January 1872, to the Legislative Council of the Governor-General, with these remarks by the Select Committee :

1876

DÁMODAR
GORDHANDFOURAM
KÁNJI

1876
DÁMODAR
GOEDHAN
v.
DEORÁM
KÁNJI.

'A conclusive presumption is a direction by the law that the existence of one fact shall in all cases be inferred from proof of another. This we have provided in Sections 112 and 113,' and 'we have provided in the chapter on the Burden of Proof that a Notification in the Gazette that a territory has been ceded to a Native Prince, shall be conclusive proof of a valid cession at the date mentioned in the Notification. The object of this section is to set at rest questions which, as we are informed, have arisen on this subject.'

"Our judgment in this case was passed on the 2nd December 1870, when there existed only the notification of the Bombay Gazette, dated 29th January 1866, and we granted the review on the 16th December 1872, in order that it might be argued whether the sanction of the Secretary of State did not operate to create a valid cession.

"But on the 4th of January 1873 appeared in the *Gazette of India* the notification that the village of Gangli, with several others, had been ceded seven years before; and we are now told that, even though the approval by the Secretary of State of the cession be not all-sufficient, we cannot consider that question. No doubt, this would be the effect of Section 113, provided that it lay within the power of the Legislative Council to make such a law.

"What, then, are the powers of the Council of the Governor-General? By Section 43, 3 and 4 William IV, Chapter 85, the Governor-General in Council was empowered to legislate for India, except that he 'shall not have the power of making any laws or regulations which shall in any way affect any prerogative of the Crown, or the authority of Parliament . . . or any part of the unwritten laws or constitution of the United Kingdom of Great Britain and Ireland, whereon may depend in any degree the allegiance of any person to the Crown of the United Kingdom, or to the sovereignty and dominion of the said Crown over any part of the said territories.'

"This section was repealed by Section 2, 24 and 25 Vic., Ch. 67, 'The Indian Councils' Act'; but, by Section 22 of this Act, it was again provided 'that the Governor-General in Council shall not have the power of making any laws or regulations which may affect the authority of Parliament.'

. or any part of the unwritten laws or constitution of the United Kingdom of Great Britain and Ireland, whereon may depend in any degree the allegiance of any person to the Crown, or the sovereignty and dominion of the said Crown over any part of the said territories.' Further on, in Section 24 of the same Act, we find that 'no Law or Regulation made by the Governor-General in Council (subject to the power of disallowance by the Crown as hereinbefore provided) shall be deemed invalid by reason only that it affects the prerogative of the Crown.'

1876

DÁMODAR
GORDHAN
v.
DEORAM
KÁNJI.

"It is a notable circumstance that the wording of the repealed section, of 3 and 4 William IV, Ch. 85, and of Section 22, of the Councils' Act, substituted for it, differs only in one particular, *i e.*, that in the latter the words 'prerogative of the Crown' are omitted, nor is it easy to understand the reason for this omission. Prior to this Act no general power was given to the Crown to disallow laws made by the Legislative Council.

"Section 26 of 16 and 17 Victoria, Chapter 95, declared that 'no law or regulation was to be invalid by reason only of its affecting any prerogative of the Crown, provided it had received the previous sanction of the Crown, signified in a prescribed form,' and the Councils' Act, which repealed this, made express provision for the transmission to the Secretary of State for India of copies of all laws and regulations assented to by the Governor-General, and for their disallowance by Her Majesty.

"In neither case was any law affecting the prerogative of the Crown to be deemed invalid, provided that, before the passing of the Councils' Act, the Crown had previously sanctioned it, or that, after that period, it had not been disallowed.

"But the law, expressly prohibiting the Legislative Council of India from making any law affecting the authority of Parliament, is in no way varied or altered, by the Indian Councils' Act.

"The value, therefore, of Section 113 of the Evidence Act depends on the constitutional question of prerogative. If the Crown alone has power to cede territory, then this provision of the law is valid and binding so long as it is not disallowed; but if, on the other hand, that power can only be exercised with the

1876

D. MODAK
GORDHANv.
D. LORAN
KANJI.

authority of Parliament, it follows, as a matter of course, that the Legislative Council exceeded its powers, and that Section 113 was and must continue to be bad law.

“On this point we have been referred to the opinions of Grotius, Vattel, Puffendorf, Chalmers, Wheaton, Phillimore, and Twiss, who all appear to support the proposition that no power resides in the Crown to cede territory save under circumstances of necessity. Most of these writers are referred to by Mr. Forsyth in the work to which we have alluded above, and the conclusion at which he appears to arrive is, that while the Crown can, by virtue of its prerogative, without any doubt, make cessions by treaty of peace at the close of a war, its power to cede territory in any other way is extremely questionable. Vattel, Puffendorf, and Grotius may or may not be accepted as authorities, but Mr. Forsyth strengthens his opinion by a consideration of known precedents. He quotes various instances of cessions made in adjustments of quarrels between nations, but can only find two in support of the Crown's unconditional prerogative—the case of the Orange River Territory, and the sale of Dunkirk by Charles II; and the latter of these two he regards, with much reason, as hardly a constitutional precedent. With reference to the Orange River Territory, we have been unable to consult the correspondence to which reference is advised; but, as it is questionable whether the British nation ever acquired a right of property in the territory, it may be more easily allowed that it was in the power of the Crown to rescind that which it had enacted by its letter patent without reference to Parliament. The cases, moreover, are not analogous, for the British territories in India have been the subject of Parliamentary legislation from the time of their acquisition, and have become thereby a material part of the property, and, therefore, of the body, of the State. It appears to be considered by some, (*vide* Lord Palmerston's speech in the debate on the Relinquishment by the British Crown of the Protectorate of the Ionian Islands,) that a distinction exists between cessions of British freehold and of territory acquired by conquest during war, and not by treaty, or ceded by treaty and held as possessions of the British Crown, but the cases he quoted were all, observes Mr. Forsyth, cessions at the close of a war. On what principle

"All subjects of the Crown possess the same rights, and incur the same obligations. Allegiance by the English law is correlative with protection, and is to be looked upon as a relation, not only between a sovereign and subjects, but as between a corporation and its members.

1876
DĀMODAR
GORDHAN
v.
DEORĀM
KĀNJI.

"That Her Majesty's subjects in India have the same rights with all her other subjects, is clear from the Queen's proclamation of 1858; the same fundamental rule, restricting the prerogative of the Crown from interference with the allegiance of subjects and their right to protection, must apply equally to all and every part of Her Majesty's dominions.

"Vattel's arguments on the principles involved commend themselves to our reason. In his Book I, Ch. 21, Section 263, he says: 'A nation ought to preserve itself, it ought to preserve all its members, it cannot abandon them, and it is under an engagement to support them in their rank as members of the nation. It has not then a right to traffic with their rank and liberty on account of any advantage it may expect to derive from such a negotiation. They have joined the society for the purpose of being members of it. They submit to the authority of the State for the purpose of promoting in concert their common welfare and safety, and not of being at its disposal like a farm or herd of cattle. But the nation may lawfully abandon them in a case of extreme necessity, and she has a right to cut them off from the body if the public safety requires.' In considering further whether the prince has power to dismember the State, he says that 'this depends on whether he has received full and absolute authority from the nation,' and proceeds:—

"The nation ought never to abandon its members, but in a case of necessity or with a view to the public safety, and to preserve itself from total ruin, and the prince ought not to give them up for the same reasons. But since he has received an absolute authority, it belongs to him to judge of the necessity of the case, and of what the safety of the State requires.'

"We have no knowledge of the reasons which induced the transfer of Gangli and other villages to the State of Bhaunagar, but it is certain that there existed no such necessity as is recognized by the publicists.

1876

DÁMODAR
GORDHAN
"DEORÁM
KÁNJI

"If, then, it be a fundamental law that the sovereign cannot of himself dismember territories, and that he can only do so with the sanction of the people in cases of real necessity, it follows that the Indian Legislature cannot make and the Crown cannot sanction a law having for its object the dismemberment of the State in times of peace.

"Further, if the sanction of Parliament be necessary for a cession in times of peace, and if allegiance be indefeasible, it follows that such a direction of the law, as the one we are contemplating, must of necessity affect the authority of Parliament and those unwritten laws and constitution of the United Kingdom of Great Britain and Ireland whereon depends the allegiance of persons to the Crown of the United Kingdom.

"This being so, Section 113 of the Indian Evidence Act, though not disallowed, is not protected by Section 24, 24 and 25 Victoria, Chapter 67, and we cannot, therefore, follow its directions. For these reasons we decline to alter our decision, which will, therefore, stand."

In pursuance of leave specially granted by the High Court, the appellant appealed against this decision to Her Majesty in Council.

Sir William Vernon Harcourt, Q.C., Mr FitzJames Stephen, Q.C., and Mr. E. Macnaghten appeared for the appellant.

Mr. Forsyth, Q.C., and Mr. J. D. Bell for the respondent.

Sir W. V. Harcourt, Q.C.:—Reading the notification published in the *Gazette of India*, of the 4th January 1873, in connection with Section 113 of the Indian Evidence Act, the Bombay High Court was bound, under Section 57 of that Act, to accept, as a fact, the territorial alterations therein notified. Such notification must be taken to determine that a cession had been made by the authority which professed to make it. If that authority was competent, the cession was valid. We do not, however, rely on the Indian Evidence Act as making valid as of right a cession which without the Act would not have been valid. In contending that the authority by which the cession was made was competent to make it, we do not rest our argument on the view that the rights vested by Act of Parliament in the Directors of the old East India Company and in the Board of Control were

transferred to the Crown under the Statute 21 and 22 Vic., Cap. 106. That seems to have been the view accepted by the High Court. Their judgment proceeds on the assumption that the prerogative and title of the Crown in the Government of India is a derivative title through the East India Company confirmed by Parliament. That, we submit, is a proposition without any foundation whatever.

1876
DAMODAR
GORDHAN
v
DEORAM
KANJI.

Lord Selborne:—I do not understand the Judges to say that the authority of the Crown is derived from the Company, but that the special direct powers given to the Secretary of State, under the Statute 21 and 22 Victoria, are only those which applied to the East India Company. If they mean that, they are probably right. The original power of the Crown stands on another basis.

Sir W. Harcourt:—The Judges, referring to certain cases of cession cited by Mr. Forsyth in his “Cases and Opinions on Constitutional Law,” made previous to the year 1858 by the East India Company to a foreign State, expressly say that these cases “furnish no sufficient presumption of the existence of a prerogative of which we cannot find any trace in any of the various Acts defining the Company’s status and powers.”

The Lord Chancellor:—In the case of *The Secretary of State v. Kamachee Boye Sahaba*⁽¹⁾ in which Lord Kingsdown delivered the judgment of this Board, it was determined that the powers of the East India Company were delegated from the Crown, and the judgment of Chief Justice Tindal in *Gibson v. The East India Company*⁽²⁾ is to the same effect.

Mr. Forsyth, Q.C.:—I do not dispute that the authority of the Crown, in a matter of this kind, as distinct from the authority of the Governor-General in Council, is not derived from any Act of Parliament.

The Lord Chancellor:—That raises another question, whether what was done here by way of cession was done with the full authority of the Crown, or was done by some subordinate of the Crown without sufficient authority.

⁽¹⁾ 7 Moore’s I. A. 476.

⁽²⁾ 5 Bing N. C. 273.

1876
DÁMODAR
GORDHAN
v.
DEORÁM
KÁNJI.

Mr. Forsyth:—On that point I shall contend that the cession was not made by the Crown, but by the Secretary of State and the Governor-General in Council under authority defined by Act of Parliament.

Sir W. Harcourt:—It would frustrate the object of the appeal if this question were decided on any side issue.

The Lord Chancellor:—The judgment of the High Court does not, I think, turn upon the distinction between an act of the Crown and an act of a subordinate authority; for, in speaking of Section 113 of the Indian Evidence Act, the Judges say: "If the Crown alone has power to cede territory, then this provision of the Law is valid and binding."

Sir W. Harcourt:—The judgment certainly proceeds on the grounds that the Crown alone had not that power. The distinction now sought to be raised is nowhere noticed in the judgment.

Sir Montague Smith:—But you must have a decision on the question whether this particular cession is valid.

Sir James Colville:—Mr. Forsyth may contend that the Crown without Parliament cannot cede territory. But he may also contend that this cession was not an act of the Crown, but of the Secretary of State, whom he considers an authority subordinate to and distinct from the Crown.

Lord Selborne:—Have we before us the materials on which a question of that sort can be raised? So far, we only know that the thing was done by the authority of the Governor-General in Council with the assent of the Secretary of State, which implies *prima facie* the assent of the Crown, and that it was gazetted in the manner required by the Evidence Act. Are we not bound on those facts to consider that the assent of the Secretary of State was the assent of the Crown, and that whatever power the Crown had, from whatever source derived, it might be exercised in that manner?

Sir W. Harcourt:—That is my contention. The only issue which we desire to be tried is whether the Crown can by its sole prerogative cede territory, or whether the consent of Parliament is necessary. The first proposition which I propose to establish is that the title of the Crown as Sovereign of India

paramount title, arising from the fundamental relation between sovereign and subject; that it is in no sense derivative; that it did not come from the East India Company, and has nothing to do with the Transfer Act of 1858, but rests on the broad principle that a subject who acquires territory, acquires for the sovereign and not for himself. This principle applies to all territorial acquisitions, whether made in time of peace or war. The East India Company acquired territory and ceased to be a purely commercial corporation. All the rights of sovereignty over the territory so acquired at once accrued to the Crown. The paramount title of the Crown was in no respect modified or affected by the restrictions, regulations or legislation which affected the puisne title of the East India Company. At the time when the Government of India was taken from the Company, Parliament might have attached restrictions to the prerogative. This was not done. The only effect of the Transfer Act of 1858 was simply to determine the trust administration of the Company, not to create the title of the Crown. It is, therefore, besides the question to investigate the rights of the East India Company; although, were it necessary, it might be shown that the power of cession was, in fact, possessed and exercised by the Company.

My next proposition is that the right of cession, resides in the sovereign power, and the only question that can arise is, where, in any particular State, the sovereign power for this purpose is vested. It is said by Mr. Justice Kent in his 'Commentaries' ⁽¹⁾ that "the power competent to bind the nation by treaty may alienate the public domain and property by treaty." The power of making treaties involves the power to cede, and in England the power to make treaties is in the Crown. The present is a case of cession under treaty. In many treaties a reservation is made that what is done is done subject to the approval of Parliament, and terms may be introduced into a treaty which cannot effectually be made without the assent of Parliament. But this is not a case of this kind.

The Lord Chancellor :—As regards the right to cede territory, is not there a distinction between territories which, belonging to the Crown, are governed without the assistance of any local legis-

1876
DAMODAR
GORDHAN
P.
DIORAM
KANJI.

(1) Kent's Commentaries, Vol. I, pp. 165-166.

1876
DÁMODAR
GORDHAN
v.
DEORÁM
KÁNJI.

lature, and territories which belong to the Crown, but are governed with the co-operation of a local, possibly a representative legislature?

Sir W. Harcourt:—I have no doubt there is such a distinction, but it is not necessary to advert to it here.

Sir Barnes Peacock:—Is this a case of cession at all? The proclamation in the *Bombay Gazette* does not say that territory is ceded, but merely that certain villages have been removed from the jurisdiction of the Revenue, Civil, and Criminal Courts of the Bombay Presidency, and transferred to the supervision of the Political Agency in Kattywad.

Mr. Forsyth:—We admit that there was, in point of fact, a cession to the Thakore of Bhaunagar, and that nothing turns on the words of the proclamation to which Sir Barnes Peacock directs attention.

Lord Selborne:—If in truth there was no cession, are we to decide an important question of law on imaginary facts? It is suggested that what in fact was done was nothing more or less than to remove particular villages from one British jurisdiction to another.

[A discussion here arose as to whether what had taken place amounted, in fact, to a cession from British territory to a foreign State.]

Sir W. Harcourt:—The Court below has satisfied itself on the documents before it that there has *de facto* been such a cession. I cannot carry the case further on that point. As to the reference made by the High Court to the authority of Grotius, Vattel, and Puffendorf, this was a question of municipal and not of international law, a constitutional question as to the prerogative of the British Crown, in respect of which the opinions of foreign lawyers could have no weight. See the speech of Lord Thurlow, in the debate in the House of Lords, on the cessions made in 1783 at the Peace of Versailles.⁽¹⁾ If there is, as the respondent appears to admit, full power in the Crown to cede territory by treaty in time of war, or at the conclusion of war, is there any difference of principle which should apply in time of peace? Circumstances of con-

⁽¹⁾ Parl. Hist., Vol. XXII, p. 430

venience and public policy may often require a cession to be made during peace; as, for instance, to avert a war, or for consolidation of territory, or the rectification of boundaries. Territory in the occupation and possession of the Crown has been surrendered in time of peace in conformity with the adjudication of an arbitrator. By a treaty with the Netherlands in 1824, Great Britain in time of peace ceded Sumatra and with it the Settlement of Bencoolen. There are stipulations in this treaty, recommending 'to the friendly and paternal protection of the Netherlands Government the interests of the natives and settlers subject to the ancient factory of England at Bencoolen.'⁽¹⁾ The factory at Bencoolen had formed a part of the dominions of the East India Company in the same way as the Presidencies of Madras and Bombay. It had been recognized and regulated by many Acts of Parliament. And yet it was ceded in time of peace, and the allegiance of its inhabitants transferred to a foreign State. By another treaty, made in 1859-60, the Bay Islands, which had been erected into a British colony with a representative Government and power to legislate, were transferred with their inhabitants to the Republic of Honduras.⁽²⁾ By another treaty with the Netherlands in 1867 an interchange of territory on the Gold Coast of Africa was carried out in time of peace. Under that treaty Her Britannic Majesty (without authority from Parliament) ceded to His Majesty the King of the Netherlands certain "British forts, possessions, and rights of sovereignty or jurisdiction."⁽³⁾ Again, the Orange River Territory, which had been recognized as British territory by letters patent, was abandoned under an order in Council in 1854, notwithstanding the vehement protests of the inhabitants.⁽⁴⁾

1870
DUMOPAR
GORDHAN
DUMAM
KANSJI.

Lord Selborne :—The peculiarity of that case is that the inhabitants of the territory were simply released from their allegiance, and authorized to form an independent Government for themselves. In principle it is a stronger case than the case of a cession.

Sir W. Harcourt :—The cases cited illustrate the different ways in which the Crown has always assumed and exercised this right of

⁽¹⁾ British and Foreign State Papers, Vol. II, p. 370.

⁽²⁾ *Ibid.*, Vol. XLIX, p. 13.

⁽³⁾ Hertslet's Commercial Treaties, Vol. XII, p. 1194.

⁽⁴⁾ See "Forsyth's Cases and Opinions," p. 185.

1876
DÁMODAR
GORDHAN
v
DORÁV
KÁNJI.

cession in territories outside of India. In India the Crown, in addition to its own inherent authority, represents the authority of the Emperor of Delhi over all the Indian princes. These princes with various forms of sovereignty are none of them absolutely independent of the Crown. The recent case of the Gaikwar might be cited to show the manner in which the Queen as Suzerain of India exercises a summary and supreme jurisdiction over the princes of India. In this delicate relationship it is absolutely necessary to attribute to the Crown the fullest powers for dealing with territory by cession, exchange, settlement, or re-adjustment of boundaries. If the authority of Parliament were required in every case in which territory is dealt with, it would be impossible to govern India. That the East India Company and the Crown had from the earliest time of their acquiring sovereignty in India exercised the right to cede territory in time of peace, could be proved by a *catena* of instances, of which the following more particularly deserve attention :—

1st.—A grant made in 1872 to Maharajah Madha Rao Scindiah in reward of his services to the English, of all right, title, and possession in the Fort, Town and Purgunnah of Broach. See *Aitchison's Treaties*, Vol. IV, p. 214.

2nd.—The cession in 1803, by the Government of Madras, of the Fort and District of Kulanelly in Tanjore to Tondiman, Chief of the Poodoccottah State.—*Aitchison's Treaties*, Vol. V, p. 331.

3rd.—The restoration, in 1806, of the territory of Sumbalpur and Patna to the Maharajah of Nagpur.—*Aitchison's Treaties*, Vol. III, p. 99.

4th.—The restoration of territory, in 1806, to the Chief of Jalaon. —*Aitchison's Treaties*, Vol. III, p. 150.

5th.—Sunnud of rent-free villages, in 1812, to Rajah Kissonj Singh of Jaitpur.—*Aitchison's Treaties*, Vol. III, p. 174.

6th.—The cession, in 1816, to the Nawab of Oudh, of the Purgunnah of Nabobgunge in exchange for the Purgunnah of Handia.—*Aitchison's Treaties*, Vol. II, p. 164.

- 7th.—The cession, in 1817, to Anund Rao Gaikwar, of the Purgunnahs Dubboy, Báhádarpur, and Sowli.—*Aitchison's Treaties*, Vol. VI, p. 331.
- 8th.—Transfer, in 1818, to Maharajah Dowlut Rao Scindiah, of lands in Gwalior, Málwa, and elsewhere, in exchange for Ajmere and other districts.—*Aitchison's Treaties*, Vol. IV, p. 253.
- 9th.—The cession, in 1831, of lands on the banks of the river Baramputer to the Rajah of Assam on his undertaking to pay tribute.—*Aitchison's Treaties*, Vol. I, p. 132.
- 10th.—Restoration, in 1846, to the Rajah of Nálágurh, of the of Málwa.—*Aitchison's Treaties*, Vol. II, p. 333.
- 11th.—Restoration, in 1856, to Holkar, of the Fort of Sindwa.—*Aitchison's Treaties*, Vol. IV, p. 294.
- 12th.—Restoration, in 1860, to the Ruler of Nepaul, in full sovereignty of certain lands in the north of Oudh.—*Aitchison's Treaties*, Vol. II, p. 223.
- 13th.—The cession, in 1871, to Scindiah, of certain villages in Jhansi.

1876
DAMODAR
GORDHAN
P.
DIOBAN
KINJE.

The cases cited show that the Government of India, as representing the Crown, has power to cede territory to Native States, princes, and rulers, and is the sole judge of the considerations of State policy by which such grants of territory must be determined. The proposition that it could not so alienate territory without the assent of Parliament was without authority, and was, moreover, unreasonable and impolitic. The present transfer appeared on the face of it to be an act of State, such as the British Crown, representing the nation in its executive capacity, and the East India Company, invested with the authority of the Crown, had always exercised. If it were to be held otherwise, there was no Native sovereign in India whose title would not be attacked and shaken. To establish such a doctrine would be to invite a fresh mutiny.

Mr. J. F. Stephen, Q.C.:—The question is whether the effect of the cession made during the pendency of the suit was not to oust the jurisdiction of the Ahmedabad Court to adjudicate upon the claim after the remand. The clause in the Indian Evidence Act, which makes a notification in the Gazette evidence of the fact of a cession, was not introduced with a view to enable the

1876 Government of India to do by indirect means what it could not lawfully do directly. It assumes that a valid cession of territory in India to a Native State is a legal possibility. If that is a mistaken assumption, the section is without operation. The section relies upon the correctness of the view expressed in the resolution communicated in the letter of the Chief Secretary to the Bombay Government in the Revenue Department of the 28th July 1871. If such a cession is legal, it was incumbent in framing the Evidence Act to set forth the means by which it might be proved. If a Court had to satisfy itself by actual inspection of documents that a cession had been made by the Governor-General in Council, and that his act had been authorized or ratified by the Crown, it would be launched upon an enquiry which it would be most improper and inconvenient for it to enter into, since it would necessitate the publication of official correspondence relating to matters of great delicacy, and expressed in language of less than legal precision. It was, therefore, necessary, especially in dealing with Courts like those in India, to cut short the proof, by making the public declaration by the Government that a cession had been made evidence of the fact. If it be rightly assumed that the Crown, or the Governor-General in Council, has legal authority to make cessions, the effect of the notification provided by the Evidence Act is to put an end to all the various miscellaneous questions and side issues which might otherwise be raised.

According to the law of England a cession of territory is valid without the interposition of an Act of Parliament. In England the sovereign power to make treaties, binding on the whole community, with foreign princes is vested in the person of the king or queen. (See *Stephen's Blackstone*, Vol. II, p. 512.) The power to make treaties involves the power to make such concessions as are required to effectuate the treaty, *e.g.*, the power to cede territory. That the Crown possesses this general power is seen by considering the particular instances in which the right has been exercised. For this purpose treaties might be distributed into three classes: those made at the end of a war, those made elsewhere than in India in time of peace, and those made in India in time of peace. With regard to the first of these divisions, it seemed to be admitted in the respondent's case that the Crown

has power to cede territory by a treaty of peace made at the end of a war. But what reason is there for thus limiting the power of the Crown? In almost every conceivable case the cession of territory has some relation, direct or indirect, to war. A cession is made under the direct pressure of war, or under the apprehension that, unless made, war will ensue. There is no real distinction in principle between the case of a cession of territory made with a view to terminate a war and a cession made to avert a war, or to avert a state of things likely to bring about a war. In both cases the cession is made under a necessity or *vis major*. On what principle is the executive power to be the judge of the necessity in the one case, and the legislative power to be the judge in the other? If the regular and proper condition of a cession of territory is the assent of Parliament, and the power of the Crown to cede territory at the termination of war rests merely on necessity and *vis major*, the Crown would require to obtain from Parliament an Act of Indemnity for a cession made in time of war as well as for a cession made in time of peace. In almost all the great treaties to which this country has been a party, the negotiations have extended over a considerable period. Ample time has been given to consult Parliament if that were the constitutional course to follow. Yet in framing these treaties the opinion of Parliament never has been taken.

It has been suggested that if the power of the Crown to cede territory in time of peace is as wide as I assert it to be, it would be competent for the Crown in time of peace, and without the consent of Parliament, to alienate an intergal part of the territory of the United Kingdom—for instance, the Isle of Wight. It is not necessary to my argument to say that the Crown has such a power. The case put is an extreme one. That the power of the Crown might be grossly abused, is no argument against its existence. The constitution theory that the king can do no wrong breaks down if we imagine the case of the king committing murder. Similarly, the Houses of Parliament might wickedly and corruptly abuse the powers entrusted to them. But the theory of Government does not contemplate the existence of such a state of things. It must be assumed, therefore, that, in making such a sacrifice as the cession of the Isle of Wight, the Crown was not

1876

DAMODAR
GORDHAN
P.
DITORAM
KANJI.

1876
 ———
 DĀMODAR
 GORDHĀN
 v
 DORĀM
 KĀNJI

acting wantonly or wickedly, but was moved thereto by adequate and weighty reasons. A security for this would be the responsibility of the ministers of the Crown.

The Lord Chancellor :—Though the minister were to lose his head, that would not restore the Isle of Wight. But the country after punishing its minister might be justified in saying that no engagement had been entered into by which it was legally or morally bound.

Mr. Stephen :—Supposing the Isle of Wight to have been ceded to Louis XIV by Charles II at the time he was pensioned by the French King, and that possession had been taken under that cession by the French without any war, and that they remained in possession, could the Court of King's Bench have held that a person born in the Isle of Wight after the cession was capable of inheriting lands in England? In such a case the maxim, not unknown in India, "*fieri non debet, jactum valet*," would apply.

Lord Selborne :—That illustration does not help you, because supposing the argument on the law is assumed against you, still the *de facto* possession of a country by a foreign Government would suspend while it lasted the Government which it had displaced.

Mr. Stephen :—Would your Lordship say that a person born in that country while the foreign possession continued was a foreigner?

Lord Selborne :—I shall wait till the identical case arises.

Mr. Stephen :—Assuming that the Isle of Wight would not be ceded except under urgent necessity, it would seem from all analogy and from the precedents of existing treaties that the right to judge of the necessity would belong to the executive and not to the legislative power. Unless, therefore, when the case arose, some distinction were suggested turning on the peculiar character of the territory, which is a point I am not concerned to argue, I would say that the duty of making the sacrifice would fall on the Crown, and not upon Parliament. The public safe-guard against the abuse of the authority of the Crown, which lies in the punishment of ministers by Parliamentary impeachment, may not be in theory

an adequate check; but in practice, no more stringent limitation has been found necessary.

One difficulty in ascertaining under what conditions cessions are lawful arises from the circumstance that this country has been more in the habit of receiving than making them. Those we have made have been chiefly by way of restorations of territory taken. At the treaty of Breda, in 1667, Nova Scotia, then termed Acadia, was restored to France, and Surinam to Holland. See *Koch and Schæell, Histoire des Traités de Paix*, Vol. II, p. 131. By the treaty of Ryswick in 1697, certain English possessions in the Hudson's Bay territory which had been taken by the French and recovered by the English were given back to the French. See *Dumont's Corps Diplomatique*, Vol. VII, Part 2, p. 400. This went beyond the ordinary case of restoring conquests. By the treaty of Aix la Chapelle in 1748, Cape Breton, which had for some time been in the possession of the English, was ceded to the French. See *Koch and Schæell, Histoire des Traités de Paix*, Vol. I, pp. 314, 315. By the treaty of Paris, in 1763, the islands of St. Pierre and Nicolan on the coast of Newfoundland, and dependencies of one of the oldest English colonies, were ceded to the French.

By the treaty of Versailles in 1783, which recognized the independence of the United States of America, Minorca and Florida were ceded to Spain, and other cessions were made to France and Holland; but the most important incident of this disastrous treaty was the cession of a great portion of the Continent of North America to persons who by a series of Acts of Parliament had been declared rebels and guilty of high treason. In this case Parliamentary authority was given to treat, and authority to treat was considered to carry with it authority to cede.

The Lord Chancellor.—Authority to treat, under the circumstances of the case, would mean authority to cede.

Mr. Stephen.—There was no express power given to the Crown to cede.

Lord Selborne.—After the matter was at an end there were acts of the Legislature which were in substance confirmatory.

Mr. Stephen.—During the conflict with America, Acts were passed treating the Americans as rebels, forbidding all inter-

1876

PANORAM
GOLDMAN
P
DORAM
KANSJI.

1876 course with them, making their ships lawful prize, and providing for their offences elsewhere than in America. The existence of such Acts of Parliament rendered it necessary that as the whole war was in fact carried on under the authority of Parliament, that authority should be had to bring the war to an end. That led to the passing of the Acts 18 Geo. III, Chap. 13, and 22 Geo. III, Chap. 46, under the latter of which peace was made. The intervention of Parliament was required in this case because Parliament had declared the persons with whom the treaty was to be made criminals, with whom no sort of intercourse was to be maintained. It was necessary before negotiations could be opened that the effect of previous legislation should be suspended. But when the authority to treat was given, the authority to cede, to renounce sovereignty, and recognize independence did not require separate sanction.

DÁMODAR
GORDHAN
v.
DEORÁM
KÁNJI.

By a treaty made at Stockholm in 1813 between England, Russia, and Sweden, the island of Guadeloupe, which was then an English colony, was ceded to Sweden. This was, in fact, a cession made in time of peace, peace with Sweden having been declared a year before.—*Hertslett's Commercial Treaties*, Vol. II, pp. 337-340, and *Koch and Schöell*, Vol. III, p. 267.

In none of these cases can it be said (unless, perhaps, in the case of the war with America) that this country had been so subjected to a *vis major*, that the cessions made were made of necessity. Yet in all these cases, which go far to make up the body of the International law of Europe as it exists at present, the Crown acted without interference of Parliament. Not one of these cases affords the least support to the contention that the authority of Parliament is necessary to validate a cession by the Crown.

As to the case of cessions made during peace, it may be said in respect of the sale of Dunkirk by Charles II to Louis XIV, that it is a transaction which no one would defend as legal or proper.

The minister who advised the sale was impeached and driven into exile, and the cession was completed in the face of the most vehement opposition on the part of the nation. But, so far as I know, there was never any question in the Courts of law that they were bound to recognise the cession when it was completed. So,

likewise, the abandonment of Tangier, in the circumstances under which it occurred, was open to blame, but it has never been said that it was not within the competence of the Crown.

The cession of Sumatra with Bencoolen to the Dutch, to which attention has already been directed, was a case entirely in point, since it was a cession in time of peace of a part of the dominions of the East India Company, made directly by the Crown in exercise of its own sovereign powers, and not of any power derived through the Company, and without reference to Parliament. A single act of this kind done publicly and deliberately by a great statesman (Mr. Canning) is in itself a precedent which cannot be disregarded. The renunciation in favour of Nicaragua of the Protectorate of the Mosquito Shore (Hertslett's Commercial Treaties, Vol. XI, p. 447), and the renunciation of the Protectorate of the Ionian Islands in 1863, were also instances of cessions made in time of peace.

As to cessions of treaty made by the East India Company in time of peace, in addition to the cases cited by Sir William Harcourt, reference may be made to the cession, in 1803, of certain territory to Maha Rao of Ulnur, for services rendered against the Mahrattas, and to the exchange of territory made with him for purposes of mutual convenience in 1805. See *Atchison's Treaties*, Vol. IV, p. 143. As to these treaties made by the Company, it has been suggested that they have been ratified by Parliament, and that the fact of their having been so ratified implies defective validity without such ratification. The Government of India Act of 1858 (Stat. 21 and 22 Vic., Ch. 106, S. 67) provides that "all treaties made by the said (*i.e.*, The East India) Company shall be binding on Her Majesty." This provision, it is said, deprives these early treaties of any weight as precedents, because it shows they stood in need of confirmation and derive their validity from Parliament. That is a very forced construction of the Act, in which no reference is made to the cession of territory, and the object of which is simply, so far as is possible, to place the Government of India as administered by the Crown on the same footing as when administered by the Company.

Lord Selborne :—Treaties are put by the Act on apparently the same footing with contracts, covenants, liabilities and engagements.

1876
DAMOLAB
GORDHAN
P. ORAM
KASJI.

1876 <hr/> DĀMODAR GORDHAN v DEORĀM KĀNJI.	The Act recognizes the Company as a competent treaty-making power, and if the treaties made by the Company involve cessions, then, by implication, it recognizes the power of the Company to make treaties involving cessions.
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Mr. Stephen :—Had there been any doubt as to the validity of the long series of treaties of the East India Company, or of the lawfulness of the cession of territory publicly made under them, they would not have been confirmed in the general and vague terms used in the Act. The Act, as I read it, does not render valid treaties which originally were invalid, but recognizes the original validity of the treaties, and accepts them as binding on the Crown. In the Charter Act of 1793 (33 Geo. III, C. 52, SS. 42, 43) there is an explicit recognition of the power of the Governor-General in Council and also of the Governors of Madras and Bombay to make war and to make treaties. What restriction is there to prevent their making treaties of cession?

Sir Barnes Peacock :—The first section of the Act says the territories shall remain and continue in the possession of the East India Company. There is no permission to estrange them.

Mr. Stephen :—Taking that in connection with the subsequent Act of 1858, I understand it merely to mean that the Company are to remain in possession of these territories for the purposes and with the powers of Government. It is not meant to exclude the power of ceding under certain circumstances.

Sir Barnes Peacock :—The territorial debt is charged on these territories.

The Lord Chancellor :—Perhaps it is only a matter of curiosity, but do you say that the East India Company could have ceded territory without the consent of the Crown?

Mr. Stephen :—It is quite unnecessary for me to contend that the Company could cede of their own right and independently of the Crown. I say that the Crown had substantially entrusted to them, among other powers, the right of making treaties on its behalf. I regard Section 68 of the Act of 1858 as putting all the treaties made by the Company on the footing of treaties made

And the noticeable matter is that after the passing of the Act of 1858 other cessions of the greatest importance have been made by the Government of India. Mr. Forsyth in his 'Cases and Opinions' has referred only to two instances of Indian cession, and these made before the Mutiny; but after the Mutiny many of the Native chiefs who had taken our side, and had distinguished themselves for their courage and fidelity, were rewarded with grants of territory. If the Courts below are right in their view, the whole of the grants made to the great Indian Chiefs of Hyderabad, Gwalior, etc., as the reward of their invaluable services at a time of extreme peril to the British Empire in India, are invalid. What would be the effect of a declaration to that effect?

Lord Selborne.:—The effect would probably be that an Act of Parliament would be passed before the end of the present session.

Mr. Stephen.:—That might be so, but the immediate effect would be to teach every chief of every state in India to look not to the Government immediately placed over him, but to the views which might possibly be entertained by Parliament. It might be possible to set up a particular grant to a particular state by Act of Parliament, but it would not be so easy to restore the prestige of the Government of India, or of the Governor-General to whom all these chiefs are accustomed to look as Her Majesty's representative. Instances of cession subsequent to the Transfer Act of 1858 are:—

1st.—The cession of territory made on the 26th December 1860 to the Nizam. See *Aitchison's Treaties*, Vol. V, p. 114.

2nd.—Restoration of territory by treaty of the same date to Scindiah.—*Aitchison's Treaties*, Vol. IV, p. 272.

3rd.—Territory conferred in full sovereignty on the Bhopal State under treaty of the 27th December 1860.—*Aitchison's Treaties*, Vol. IV, p. 322.

4th.—Sunnud granting villages in Bareilly to the Nawab of Rampur.—*Aitchison's Treaties*, Vol. II, pp. 29, 30.

5th.—Sunnuds according full sovereignty over his ancestral possessions to the Maharaja of Puttiala, and conferring other territories upon him to be enjoyed on the same terms as his ancestral possessions.—*Aitchison's Treaties*, Vol. II, pp. 293, 297.

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1876

DAMODAR
GORDHAN
" "
DEORAM
KASJI.

1876

DÁMODAR
GORDHAN
v.
DEORÁM
KÁNJI

6th.—Sunnuds in similar terms and making similar grants.
—*Aitchison's Treaties*, Vol II, pp. 304, 306-309

The fact that all these grants were made with extreme publicity, and to that end were clothed with every solemnity and formality which could be given to them at a time when the attention of the public was strongly interested in the matter, without any objection being taken in Parliament, was in itself a guarantee to those to whom the grants were made that they were absolutely valid and binding. That great public transactions like these regularly carried out in the face of the world should be set aside because some petty question as to the right of parties under a mortgage deed happens to turn up in a Court of Justice, would be a most dangerous doctrine subversive of all confidence in the acts of our Executive Government. In this point of view the matter which is strictly a question as to whether this cession was valid according to the municipal law of England, has also a relation to International Law. A treaty between nation and nation, which, according to the ordinary custom of nations, is and ought to be regarded as valid and binding, must be accepted as valid and binding by the Courts of law of these nations. If the contrary were the case, it would lead to a conflict between the Courts of Justice and the Executive Government such as would render the conduct of affairs impossible. If, therefore, this cession is one which International Law would regard as valid between nation and nation, it must be recognized as valid by the Courts of law.

As to the authority of those writers on International Law to which reference has been made in the judgment of the Court below as being opposed to the right of ceding territory to a foreign state, it will be seen that the substance of their remarks is rather of an ethical than of a legal character. They simply say it is wrong to cede territory without grave reason. The speculations of Grotius (*de Jure Belli et Pacis*, B. II, Cap. 6, Secs. 3, 4) turn on the theory of a social contract and have no practical bearing on the matter in hand. Sir R. Phillimore, in his work on International Law (Vol. I, p. 313), lays down the broad principle that "a nation which allows its ruler either in his own person or through his minister to enter into negotiations respecting the

alienation of property with other nations, must be held to have consented to the act of the ruler, unless it can be clearly proved that the other contracting party was aware at the time that the ruler in so doing was transgressing the fundamental laws of his state." Passages from Vattel are cited by Sir R. Phillimore in support of this position, which further recommends itself as being in accordance with ordinary and obvious common sense. See *Kent's Commentaries*, 12th ed., Vol I, p 285, and *Wheaton on International Law*, Part 3, Cap. 2.

1876
DAMODAR
GORDHAN
P
DEORAM
KANJE.

On this view the English nation is bound to regard as valid those acts of cession which were solemnly made to Native princes without objection at the time. These were acts of state done by the sovereign in respect of independent sovereign powers, and it would be a breach of public faith to question them or allow them to be questioned in a Court of Justice.

Sir Barnes Peacock.—If the President of the United States were by himself, without the concurrence of the Senate, to make a treaty, and the Senate did not impeach him, do you contend that that treaty would be binding, and would warrant his making future treaties without the Senate's concurrence?

Mr. Stephen.—In America the constitution is defined in express terms by a written document which provides that the Senate is to concur in making treaties. In England we have no written constitution, but leave such matters to be determined as the circumstances of the case may require, in accordance with precedent.

Sir Barnes Peacock.—Is not the constitution reduced to writing by 21 and 22 Vic., Ch 106?

Mr. Stephen.—Certainly not. The power of the Crown in no way depends on that Act. The Queen acts by virtue of her prerogatives. In the Tanjore case⁽¹⁾ already referred to, it was decided that the Crown, exercising its sovereign power through the East India Company, could acquire and retain territory, and that such an act of the Crown was not subject to the control of the Municipal Courts either in India or in this country. The present is the converse case. Here the Crown cedes territory. But the

⁽¹⁾ 7 Moore's I. A. 476.

1876
DAMODAR
GORDHAN
v
DEORAM
KANJI.

same principle applies. The act of the Crown is an act of State, and cannot be questioned in a Court of law. By the English Constitution the executive government is the prerogative of the Crown. Parliamentary control, which may take the form of refusing supplies or impeaching ministers, is exercised actively only in rare cases. Acts falling within the sphere of the Executive Government when once done must be accepted as valid, though they should subject the minister who does them to punishment. It is conceded by the other side that to terminate a war cessions may be made by the Crown without authority from Parliament.

Sir Barnes Peacock :—A cession of territory made to terminate a war, is in fact, conquest.

Mr. Stephen :—It is buying peace. But that is a different thing from conquest. By conquest, I should understand the actual occupation of the country by force.

Sir Barnes Peacock :—But cession is a thing forced upon you.

Mr. Stephen :—It may be an act of necessity, no doubt. What I say is that the Executive Government is to decide when the necessity has arisen.

Sir Barnes Peacock :—Would you contend that the Governor-General could have given up Bengal with all its revenues to the King of Delhi?

The Lord Chancellor :—The question is whether the Imperial Government with the Governor-General could not have given up Bengal.

Mr. Stephen :—I say certainly they could, subject to their constitutional responsibility.

Sir Barnes Peacock :—That is in the case of war.

Mr. Stephen :—I say, there is no real distinction between the case of war and the case of peace. If it be granted that the Crown has power to cede in time of war without authority from Parliament, then, as the Crown has undisputed power to make war, it is conceivable that a bad king might declare war simply with the view of effecting a cession. He might, indeed, be dethroned, but if the cession were actually effected, a Court of Justice

according to the admission of the other side, would be bound to recognize it.

Sir Montague Smith.—If we are to look to consequences, the consequences of declaring an unjust war might be infinitely more disastrous than a mere cession of territory.

Mr. Stephen.—Unquestionably. In carrying out the acknowledged privileges of the Crown, we may have results as alarming as the cession of the Isle of Wight or of Bengal.

Sir Barnes Peacock.—I only put it to you to test your proposition which, it is important, we should have clearly placed before us. You contend that the Crown has the power to cede the sovereignty of any part of its dominions to a foreign state, in the exercise of its prerogative in a constitutional manner.

Mr. Stephen.—That is my contention generally; but I am not prepared to deny that there may be a distinction, though at this moment it does not occur to me, between different parts of Her Majesty's dominions.

Lord Selborne.—What I understand you to mean is, that as a general rule, this power rests in the sovereign, and that the burden of proof would be on the other side.

Mr. Stephen.—Quite so; that is the sum and substance of my argument.

The Lord Chancellor.—You say that the power of cession is part of the Crown's *plenum dominium* over its possessions, but that it may be limited, curtailed, or taken away, and checks put on its exercise. So far, however, as that has not been done, it remains in full force.

Mr. Stephen.—That is entirely what I have been endeavouring to express in my answers to your Lordships. The cases indicate a sort of graduated scale in which the right of cession has been exercised. The simplest form is precisely that with which we are now dealing. A second step is such a case as that of Bencoolen which had been recognized in various Acts of Parliament as a part of the British possessions. The third step is illustrated by the case of the Bay Islands, which had been provided with a constitution and constitutional Government, and which were a settled and not a conquered colony.

1876

DANOTAR
GORDHAN
P
DEORAM
KANJI.

1876

DÁMODAR
GORDHAN
v.
DEORÁVI
KÁNJI

The Lord Chancellor.—In the case of the Bay Islands very possibly the Legislature there were consenting parties.

Mr. Stephen.—In an Empire such as ours, having so many dependencies with institutions of such infinite variety, it is impossible to make any general proposition as to what may or may not be done, which might not require qualification when applied to some particular territory. Taking the case of Canada, let us suppose that there are islands in Lake Superior belonging to Canada, and that there are reasons for ceding these islands to the Government of the United States. If I were asked who could make that cession, I should answer that Her Majesty's ministers, who would be responsible for the transaction, would do well to consult the Governor-General of Canada and the Dominion Parliament.

Lord Selborne.—If the Dominion Parliament were not consulted, it would, no doubt, be regarded as a very great outrage.

The Lord Chancellor.—In the *Bishop of Natal's case* ⁽¹⁾ this Board had occasion to lay down, what may have seemed a self-evident proposition, that where once representative institutions have been conceded to a colony, the Crown stands to that colony in the same position as it stands to the United Kingdom.

Mr. Stephen.—My illustration was intended to show that there were limits to the authority of the British Parliament, and that in dealing with cases of cession you have to consider each case with reference to its own particular circumstances.

The Lord Chancellor.—If the question had arisen before Canada had any Parliament, then, if your argument in the case of India is right, the Crown would have had the right to cede.

Mr. Stephen.—While Canada was a Crown colony, there could have been no question about it. Seeing it has a Parliament, it would be unwise and impolitic for the Crown to exercise its right without reference to those interested in the matter.

Lord Selborne.—An argument which might be used as to the territory of the United Kingdom might have no application to the Fiji Islands.

Sir Barnes Peacock.—What do you say to the “Act of Settlement” which entails the sovereignty of the whole of the British dominions on the heirs of the body of the Princess Sophia? Can the sovereign by treaty part with the dominion settled under that statute?

1876
DAMODAR
GORDHAN
“
DILORAM
KANJI.

Lord Selborne.—You would say that the powers and rights of the Crown are not affected by that statute, but only the devolution of them.

Mr. Stephen.—The Princess Sophia and her heirs will take the sovereignty with all its powers and rights, including the power of cession if that belongs to it. There is nothing in the case of the present cession which makes it necessary for the Crown to refer the matter to Parliament.

Sir Barnes Peacock.—Parliament has legislated for the territory ceded.

Mr. Stephen.—And so it had legislated for Bencoolen and the Gold Coast, and the other places which have been referred to.

Sir Barnes Peacock.—What do you say was the act of the Crown in parting with this territory under its prerogative? What do you say was, in fact, done by the Crown?

Mr. Stephen.—I say that whatever was necessary to be done to make a valid cession was done.

Sir Barnes Peacock.—You contend that we are bound by the notification of the Governor-General, which appeared in the *Gazette of India* on the 4th January 1873, and which under the provisions of the Evidence Act is to be deemed conclusive proof of a valid cession. But the High Court in pronouncing its original judgment had not that proof before it, for that notification had not then been published, and the Evidence Act had not been passed. Then an application is made to review that judgment on the ground that the law has been altered, and that proof is supplied by this notification. But if, in the absence of such proof, the original judgment of the Court was right, are we entitled to declare that the High Court was wrong in refusing to reverse that judgment on review, because the law had been altered in the meanwhile?

1876

DĀMODAR
GORDHAN
v
DRORĀM
KĀNJI.

Lord Selborne.—If it be true that the Indian Courts must take judicial notice of the territories of the Queen in India, then, if there has been a cession of territory, they must take notice of that, and they must do so independently of this Gazette, which is no part of the cession but only evidence of it.

Mr. Stephen.—They ought to have taken judicial notice of the cession. If we are to work out the matter on such minute grounds, I think that what Lord Selborne suggests is an answer to the question, whether they should have taken notice of the cession originally; but, at any rate, when they got special and statutory notice they were bound by that.

Sir Barnes Peacock.—Then the Court had originally to see whether there had been a valid cession. What is a valid cession? Apart from the proclamation, what is the truth of the case? Was there, or was there ever intended to be a cession?

Mr. Stephen.—The object of the section in the Evidence Act is entirely to settle that question.

Sir Barnes Peacock.—I only want to know what you say the cession is, putting the notification in the Gazette entirely out of the question.

Mr. Stephen.—I cannot put it out of the question.

Lord Selborne.—We seem to be fully in possession of the facts.

Sir M. Smith.—I thought the argument was to proceed on the assumption that there was *de facto* a cession by the Crown through its agents, and that the only question was whether the Crown could make such a cession without the assent of Parliament.

Lord Selborne.—As I understand it, the Court below was satisfied that, as a matter of fact, this had become foreign territory, that there had been *de facto* a cession by the concurrence of the Indian and the Home authorities.

The Lord Chancellor.—There was a *de facto* cession; the only question is, was it *de jure*?

Mr. Stephen.—I desire to add a word or two to what Sir William Harcourt has said in regard to the judgment of the High Court.

The Lord Chancellor.—That part of the judgment which relates to the Evidence Act is hardly of importance now.

Mr. Stephen :—I shall not touch on that point further. I would direct attention to the concluding part of the judgment, where after citing passages from Vattel to the effect that a nation ought not to abandon its members, except in cases of extreme necessity, the Judges go on to say that they have no knowledge of the reasons which led to the present cession, but that there certainly existed no such necessity as is recognized by the publicists. This implies that the Court considered that they had a right to enter into the question of whether there was a necessity or not, and to determine that the cession was valid if made under necessity, and not otherwise.

Lord Selborne :—The High Court seems to have thought that necessity meant either war, or some similar *vis major* of the existence or non-existence of which they might take cognizance.

Mr. Stephen :—That would be a most dangerous view.

Sir M. Smith :—A question of necessity would be one of policy, not of law.

Mr. Stephen :—Here we have the Court, many years after the thing has been done, going into the question of whether it was necessary. That shows the absurdity. If necessity justifies cession, the sovereign who makes the cession must judge of the necessity, and the necessity must be assumed as a matter of law. The High Court has said that there was no necessity. But necessity is a relative term, and things unimportant in themselves may lead to important results.

The Lord Chancellor :—It cannot be contended that the validity of a cession is to depend on the judgment which a Court of law may form as to its necessity.

Mr. Stephen :—And yet that seems to be the inference from the language of the High Court. The whole judgment of the High Court turns on what they pronounce to be a fundamental principle of the law of England, viz., that allegiance is indefeasible. Now the doctrine of the English law concerning allegiance, as laid down in *Calvin's Case*, is that on the birth of the subject allegiance attaches to the person of the sovereign, and follows him, and is not dependent on the place where the subject may reside, but is a personal relation between him and the sovereign. *Coke's Rep.*, Part 7, p. 1. *Hales' Pleas of the Crown*, Vol. I., p. 68.

1876
DĀMODAR
GORDHAN
v.
DEORĀM
KĀNJI.

The Lord Chancellor —How does that doctrine bear on this question? Let it be granted that a subject cannot get rid of his allegiance, that does not advance us in considering whether the sovereign can cede territory.

Mr. Stephen :—I am merely answering an objection to which the High Court seems to attach great importance. They say allegiance is indefeasible; I say that may be so, but since allegiance is merely a personal relation between sovereign and subject, the fact of it being indefeasible is no argument that the sovereign cannot cede the territory in which the subject lives.

Lord Selborne :—The view that a subject cannot by any act of his own absolve himself from his allegiance, is not inconsistent with the view that he may be so absolved by some authority in the state.

Mr. Stephen :—The Court below seems to think that there was some sort of marriage tie between the Crown and its subjects.

Sir M. Smith :—And no Divorce Court.

Mr. Forsyth, Q.C., for the respondent :—The question is whether a British subject, having brought a suit in a British Court of Justice, within British territory, and established under the authority of Regulations themselves authorized by Acts of Parliament, and having obtained a decree, can be deprived of the fruits of that decree by an act of the Executive, which in the present instance I will admit was the Crown. I call attention to these facts, because, in considering the question as to the power of the Crown to cede territory, it may appear that there is a sound distinction between the power of the Crown to alienate, in certain emergencies, territory which has never been made the subject of Parliamentary legislation, in which there exist no municipal institutions created by Act of Parliament, as, for instance, in the case of a country taken by conquest in war, and restored when peace is made, and its power to alienate territory which has been legislated for by Parliament. To attribute such a power to the Crown in the latter case is to authorize it by its Executive act to repeal the Acts of the Legislature. This, I submit, is beyond the prerogative powers of the Crown.

The district of Gogo was ceded to us by the Peishwa, and became British territory under the treaty of Bassein in 1802. It

belongs to the Presidency of Bombay. By 47 Geo. III., c 68, legislative powers were conferred on the Governor of Bombay, under which powers the Bombay Regulations were passed. By Bombay Regulation II of 1827, Gogo is made part of the Zillah Ahmedabad, and authority is given to the Judge of Ahmedabad to administer justice in the district of Gogo

1876
DAMDAR
GORDHAN
P.
DEORAM
KANJI

Lord Selborne —If the power of cession existed in the Crown before that Regulation, what is there in the Regulation to take it away?

Mr. Forsyth —The Regulation being passed under authority of an Act of Parliament and municipal institutions being thereby established, the Crown cannot by its prerogative give away the territory to a foreign power, and so deprive the inhabitants of rights guaranteed by Act of Parliament.

Lord Selborne :—I do not perceive that any rights were guaranteed by Act of Parliament.

Mr. Forsyth —I say that the three estates of the realm having sanctioned the creation of a Court of Justice within this territory, the rights of the inhabitants to the benefit of the Court's administration of justice cannot be taken away by the Act of the Crown alone.

Lord Selborne :—Will not the same argument apply to all those cessions in India to which reference has been made?

Mr. Forsyth :—I shall presently attempt to show that these cessions were of territories not touched by any Act of Parliament.

The Lord Chancellor .—Do you say that if an Act of Parliament were passed this session to authorize a particular Court to be set up in Fiji for the benefit of the inhabitants, that would deprive the Crown of any right it might before have had to cede Fiji?

Mr. Forsyth :—I think so. The Crown would be a party to the Act of Parliament.

The Lord Chancellor :—Being a party to the Act would be nothing. That would not terminate the right to cede, supposing it existed before. Take the case of the Crown, by its own letters

1876
 DÁVODAR
 GORDHAN
 v.
 DEORÁM
 KÁNJI.

patent, setting up a Court of Justice in a conquered or ceded territory for the benefit of the inhabitants. Would that destroy a right of cession which before existed?

Mr. Forsyth :—Perhaps not. But where Parliament has interfered, then the Crown's prerogative to cede, if there be such a prerogative, is gone.

The Lord Chancellor.—Parliament interfering is too vague an expression. It might interfere in a variety of ways. I want to know what interference you think would limit the power of the Crown. Supposing that to provide for the expenses of the Court an Act of Parliament had to be obtained, would that put an end to the Crown's right to cede? Have you any authority for saying that it would?

Mr. Forsyth :—I shall endeavour in the course of my argument to show that there is such authority, particularly with regard to the case of the American Colonies in 1783. It is difficult, however, to find any distinct judicial authority, dictum, or decision which is in point. I believe this is the first time the question has been raised in a Court of Justice.

Lord Selborne.—If that be so, and there are so many instances of cessions having been made, does not it tell strongly against you?

Mr. Forsyth.—I shall deal with these instances and distinguish them so as to show that, with perhaps one exception, they are not in point. But I do not wish to anticipate the argument which I shall go into.

The Lord Chancellor.—I do not ask you to change the course of your argument, but I should be glad to know what are the conditions of your argument. Do you or do you not admit that where Parliament has not interfered there is a right of cession in the Crown? In the case of a conquered or ceded territory, for example, does the right to cede exist before Parliament has legislated in respect of such territory?

Mr. Forsyth.—I will admit that at the conclusion of a war, for the purpose of making peace, the Crown has power to cede conquered territory which has not been made the subject of

The Lord Chancellor :—Apart from any question of war, is there that right in the Crown?

Mr. Forsyth :—I contend not. I will examine the cases cited, and show that they do not establish such a right.

The Lord Chancellor :—That is a question on which, independently of precedents, constitutional writers might be expected to pronounce an opinion.

Mr. Forsyth :—I venture to say that no constitutional writer, lawyer, or jurist has ever asserted that the Crown has the power.

The Lord Chancellor :—I should doubt that; but can you cite any authority, any constitutional writer whose opinion on such subjects is generally received, who says that the Crown has not this power?

Mr. Forsyth :—I hope by-and-by to quote several.

The Lord Chancellor :—Would it not be well to see how the matter stands on that point first; for if there is such antecedent authority in your favour, it may not be necessary to go further. On the other hand, if there is no such authority, we must proceed by degrees.

Mr. Forsyth :—If the authorities were against me, then of course the burthen would be on me to get rid of them.

The Lord Chancellor :—Vattel, who has been treated as an authority by the Court below, if you read the whole of his chapter on the subject, and not selected sentences as to what may be the moral duty of a Government, seems to me a strong authority in favour of there being a right of cession in the Crown. I should like to hear how it strikes you.

Mr. Forsyth :—I will deal with that presently. I was distinguishing between territory which had been legislated for and territory which had not, and I was urging that the Crown could not alter the provisions of an Act of Parliament.

Lord Selborne :—Is not that begging the question? Is it not for you to show that there is something in the Act of Parliament which necessarily takes away the Crown's right to cede? It is not inconsistent with that right that provision should be made for the good government of the country.

1876

DANODAR
GORDHAN
P.
DEORAM
KANJI

1876

DANODAR
GORDHAN
v
DEORAM
KANJI.

Mr. Forsyth —As an illustration of the effect of Parliamentary interference I would say that the effect of the Act of Union between Great Britain and Ireland in 1801 was so to unite these countries that the Crown could never afterwards by any Executive act separate them, or give up any part of them to a foreign state, and the same would apply to Scotland after the union with that country. The prerogative of the British Crown, I conceive, to rest on the Common Law. If the Crown has unlimited power to cede territory, there should be some authority to show it. In support of every other prerogative of the Crown, authority might be cited. But I have searched in vain for any opinion of the text writers, or any decision of a Court of Justice which even hints at an unlimited power in the Crown to cede British territory.

The Lord Chancellor.—You are now speaking rather of the territories of the United Kingdom. I want to hear your views as to the power of the Crown in respect of what are known as Crown colonies, colonies which have not been legislated for by Parliament, and which have not been provided with a legislation of their own. Take the case of Fiji.

Mr. Forsyth —I say that in time of peace the Crown has no power to cede Fiji.

The Lord Chancellor —On what principle do you say so?

Mr. Forsyth :—To see what power the Crown has, I must look at what the Crown has done. I cannot attribute a power to the Crown which I do not find recognized by any text writer, or any Court of Justice.

The Lord Chancellor :—Surely the text-writers will assist you if the case is as you say. Could not an absolute sovereign part with the territories over which he is absolute sovereign?

Mr. Forsyth :—But the Queen is not an absolute sovereign, not even of Fiji. She could not, to suppose an extreme case, introduce trial by torture into Fiji. She is controlled by the law, and is not absolute in the sense in which an Oriental despot is absolute, who can deal with his subjects like herds of cattle.

acquired appears otherwise unlimited, unless you can show some limitation.

Mr. Forsyth.—I contend that in time of peace the Queen could not alienate Fiji, but it is not necessary to my argument to say so.

The Lord Chancellor.—It will assist your argument very much if you could establish that

Sir M. Smith.—Has she power to accept the cession of Fiji?

Mr. Forsyth.—That is different. You may accept many things which you cannot give away.

Sir M. Smith.—Does not the Crown represent the State for both purposes?

Mr. Forsyth.—The Crown no doubt represents the State in dealing with foreign countries in so far as making treaties is concerned. But that power is limited by constitutional usage

The Lord Chancellor.—We shall come to usage afterwards. At present we should wish you to refer us to any passage in any constitutional writer, who commands respect, declaring that the Crown has not that power.

Mr. Forsyth.—In Wheaton's International Law, 8th ed., Section 542, it is said:—"In Great Britain the treaty-making power as a branch of the legal prerogative has in theory no limits, but it is practically limited by the general controlling authority of Parliament, whose approbation is necessary to carry into effect a treaty by which the existing territorial arrangements of the Empire are altered."

The Lord Chancellor.—That opinion seems rather against you. He says that in theory there is no limit to the power of the Crown, though practically there is a control by Parliament. If a treaty involves arrangements which require the interference of Parliament, Parliament will interfere, but theoretically the power is with the Crown.

Mr. Forsyth.—In discussing the power of the sovereign to surrender territory the foreign jurists assume the case, not of a constitutional monarch like the sovereign of this country, but of an absolute prince. Puffendorf in his 'Law of Nature and

1876

DANODAN
GORDHAN
v
DEORAM
KANJI.

Crown having so dealt with territory for which Parliament has legislated. Such territory becomes a part of the British Empire in the same way as the Isle of Wight. I ask attention to what took place when we made peace with America in 1783, after the War of Independence.

1876

DA MODAR
GORDHAN
"
DORAM
KANIL.

The Lord Chancellor :—You must remember that was not a question of cession.

Mr. Forsyth :—The very word cession is used in the treaty.

The Lord Chancellor .—It was not a case of cession in the sense we have been using the word. A portion of the territories of the Crown had revolted. The Crown recognized them as successful, and dealt with them, not as ceding to a foreign power, but as relinquishing rights as against its own subjects. There was an absolute necessity in a proceeding of that kind that Parliament should intervene.

Mr. Forsyth :—I doubt whether Parliament would have intervened but for the cession.

Lord Selborne :—During the progress of the war, Acts of the Imperial Parliament had been passed which rendered it impossible for the Crown to bring the war to a termination without consulting Parliament. The Crown could not repeal the Acts which required that the Americans should be treated as rebels and pirates.

Mr. Forsyth :—The terms of the treaty with the Americans, which involved the cession of portions of Canada and Nova Scotia, were discussed in Parliament, and were defended on the ground that they were in accordance with the powers conferred by Parliament for the purpose.

Lord Selborne :—As to these cessions of portions of Canada and Nova Scotia, did they prevail, or not? They were not authorized by the Act of Parliament which enabled the Crown to treat. These were territories which had not participated in the rebellion.

Mr. Forsyth :—I cannot find whether these cessions prevailed or not.

Lord Selborne :—There was, at any rate, no Act of Parliament to authorize them.

1876
DÁMODAR
GORDHAN
v
DILORÁM
KANJI

Nations,' B. VIII, Ch. 5, Section 9, nevertheless says that where a prince alienates a part of his kingdom, he requires the consent both of those of his people who are to continue under his Government and of those who are to be transferred.

Lord Selborne.—Puffendorf would require not only the assent of the Imperial Parliament, but also the assent of the people of Gogo to validate the cession.

The Lord Chancellor.—Puffendorf recognizes elsewhere the moral right of those whose territories are to be given up to constitute themselves an independent state if they are strong enough to assert the right. That implies that an absolute sovereign may abandon them.

Mr. Forsyth.—No doubt. An absolute prince may do what he likes, for aught I know.

The Lord Chancellor.—I do not mean absolute in the sense of a despot. I am speaking of a sovereign in whom the *plenum dominium* over territory is deposited, as in the case of the Crown over a Crown colony.

Mr. Forsyth.—An absolute prince may withdraw his troops from a part of his territories, and so abandon them. He does not care whether the inhabitants are under his allegiance.

Lord Selborne.—You say he may do that, but not cede.

Mr. Forsyth.—I say an absolute prince may, but that a constitutional monarch cannot.

The Lord Chancellor.—His constitutional advisers would be called before the tribunal of Parliament to answer for what they had done.

Mr. Forsyth.—That is merely an impeachment, an entirely insufficient remedy. Could the Crown withdraw itself from the Isle of Man, and say that it shall henceforth be independent?

The Lord Chancellor.—The Isle of Man has representative institutions.

Mr. Forsyth.—They might go with the island. I say that whatever may be done by an absolute power, the English Crown cannot renounce the allegiance of its subjects. The case of the Dukedom of Guienne, referred to by Puffendorf, of which the

particulars are given in the 4th volume of Rapin's History of England, is in point. Richard II. tried to make a grant of Guienne in full sovereignty to the Duke of Lancaster. The people took up arms, and refused to be transferred from their allegiance. The grant had consequently to be revoked, and Guienne remained part and parcel of the realm of England.

1876

DÁMODAR
GORDHAN
v.
DEORÁM
KÁNJI.

Lord Selborne :—The fact of all our French possessions having been ceded without any Act of Parliament being passed to authorize the cession, is rather against you.

Mr. Forsyth :—We are driven from them. There was no treaty of cession. It was a case of conquest.

Lord Selborne :—Some of them certainly were ceded. But that is not material.

Mr. Forsyth :—Grotius (de Jur. Bell. et Pac., B. II, Cap. VI, Sections 8, 9) disputes the right of a state, and still more of a king, to alienate, even on the grounds of public utility or necessity without consent. Wheaton seems to me to take the same view, and I think that the opinions of Kent and Phillimore refer only to the power of the Crown in making a treaty of peace at the conclusion of a war. In neither of the last-named writers is there the least hint of any power existing in the Crown to alienate British territory in time of peace. The passage in Phillimore to which I particularly refer is in Cap. XIV, para. 262, where he discusses the views of Grotius, Puffendorf, and Vattel.

The Lord Chancellor .—Vattel (B. I., Cap. 21, Sections 262, 265) expressly repudiates the view of Grotius and Puffendorf that there is a general presumption against the power of the sovereign to alienate without the consent of his subjects.

Mr. Forsyth :—He is speaking of what may take place in time of war.

Lord Selborne :—He speaks of a cession to a neighbour as distinct from a cession to an enemy.

Mr. Forsyth :—He says that where the fundamental laws of a state forbid its dismemberment, the prince cannot dismember without the concurrence of the nation or its representatives. But where the laws are silent, or where a nation has given its sovereign,

1876

DĀMODAR
GORDHAN
v.
DEORĀM
KĀNJI.

without reserve, the full right to treat and contract with other states, it is considered to have invested him with all powers necessary to make a valid contract, and to have made him judge of the necessity of the case, and what the safety of the state requires. If these views be correct as applied to this country, and the English Crown has such absolute authority, then the Crown might cede Dover to France to-morrow.

The Lord Chancellor.—Is that so? If in respect of the United Kingdom the *plenum dominium* is not in the Crown alone, but in the Crown and Parliament together, then a cession cannot take place without the authority of both Crown and Parliament. But in the case of a Crown colony, the *plenum dominium* is in the Crown alone, and the cession will not require the assent of Parliament. Unless you assume that the case of a Crown colony and of the United Kingdom are identical, the answer to the one case is not the same as to the other.

Mr. Forsyth.—Mr. Stephen put the two cases on the same footing. He was bold enough to say that the Crown could cede the Isle of Wight.

The Lord Chancellor.—He carried his argument to that extent, but at the same time he said it was not necessary for his case.

Mr. Forsyth.—It was the logical sequence of his argument and, as I think, a *reductio ad absurdum*. I can understand that a Crown colony may be supposed to stand on a distinct footing. But here we are dealing with the case of British territory which has been legislated for, and to which institutions have been given under the authority of Acts of Parliament.

The Lord Chancellor.—That is the second branch of the argument. In dealing with the first branch we had to see whether, generally speaking, the Crown had the right of cession. You are now to show that, assuming the general right, that right is lost where Parliament has legislated.

Mr. Forsyth.—At the conclusion of war and to purchase peace the Crown has the right to restore conquered territory. It has exercised that right constantly, uniformly, and without challenge. But there is no instance (with the exception of the case of Bencoolen, to which reference will presently be made) of the

Crown having so dealt with territory for which Parliament has legislated. Such territory becomes a part of the British Empire in the same way as the Isle of Wight. I ask attention to what took place when we made peace with America in 1783, after the War of Independence.

1876

DAMODAR
GORDHAN
v.
DEORAM
KANJI.

The Lord Chancellor :—You must remember that was not a question of cession.

Mr. Forsyth :—The very word cession is used in the treaty.

The Lord Chancellor :—It was not a case of cession in the sense we have been using the word. A portion of the territories of the Crown had revolted. The Crown recognized them as successful, and dealt with them, not as ceding to a foreign power, but as relinquishing rights as against its own subjects. There was an absolute necessity in a proceeding of that kind that Parliament should intervene.

Mr. Forsyth :—I doubt whether Parliament would have intervened but for the cession.

Lord Selborne :—During the progress of the war, Acts of the Imperial Parliament had been passed which rendered it impossible for the Crown to bring the war to a termination without consulting Parliament. The Crown could not repeal the Acts which required that the Americans should be treated as rebels and pirates.

Mr. Forsyth :—The terms of the treaty with the Americans, which involved the cession of portions of Canada and Nova Scotia, were discussed in Parliament, and were defended on the ground that they were in accordance with the powers conferred by Parliament for the purpose.

Lord Selborne :—As to these cessions of portions of Canada and Nova Scotia, did they prevail, or not? They were not authorized by the Act of Parliament which enabled the Crown to treat. These were territories which had not participated in the rebellion.

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1876

DĀMODAR
GORDHAN
v.
DEORĀM
KĀNJI.

Sir William Harcourt :—This treaty included not only the recognition of American Independence and the cessions of territory in Canada and Nova Scotia, but also large cessions to France and Spain. The House of Commons, while it approved of the recognition of Independence, passed a vote of censure on the ministers in respect of the cessions.

Mr. Foryth :—There were in fact three treaties of peace made at the same time : one with France, one with Spain, and one with America. Florida and Minorca were ceded to Spain. When the articles of the treaties came to be discussed by the House of Lords, Lord Loughborough contended that no prerogative existed in the Crown to cede, without the authority of Parliament, any part of the dominions of the Crown, in the possession of subjects under the allegiance and at the peace of the king. Lord Thurlow dissented from that assertion in a declamatory speech which has been referred to by Sir William Harcourt. In the course of the debate Lord Carlisle cited the case of Dunkirk, and observed that the difficulty in impeaching Lord Clarendon for advising the Crown to sell Dunkirk, was to prove that Dunkirk had ever become annexed to the Crown. Had that been shown, the Crown could not have parted with it without the assent of Parliament.

The Lord Chancellor :—These are such arguments as may be expected to be used in party warfare. If the Government of the present day were to cede Gibraltar, without previous communication to Parliament, we should hear the same expressions used in Parliament, that it was an act deserving of censure, for which the minister should be impeached. But such language does not imply that the Crown has not got the power. It rather assumes that it has the power, but that it is criminal to exercise it in a matter of the gravest importance without consulting Parliament.

Mr. Forsyth :—That is not what Lords Loughborough and Carlisle say.

The Lord Chancellor :—I take it that if a minister communicated to Parliament that a cession had been made, or was to be made, and Parliament approved of it, without any statute being passed, the cession would take place by virtue of the prerogative of the Crown, and not under any Parliamentary power.

Mr. Forsyth :—Lord Loughborough and Lord Carlisle say that the right of cession is no part of the prerogative of the Crown.

The Lord Chancellor :—Then the whole thing is invalid.

Mr. Forsyth :—They say the thing is unlawful.

The Lord Chancellor .—They say, having done what you should not have done without the assent of Parliament, you deserve to be impeached. The same might, perhaps, be said, though it could hardly be truly said, in respect of the cession of Gogo.

Mr. Forsyth :—Lord Loughborough was a lawyer, and should be credited with having understood the meaning of his words when he said “no prerogative exists in the Crown to cede the Crown dominions without the authority of Parliament.”

Lord Selborne :—And yet the cessions of which he spoke were made without the authority of Parliament.

Mr. Forsyth :—No doubt. But at the end of a war and to purchase peace.

The Lord Chancellor :—Then Lord Loughborough was not right in what he said.

Mr. Forsyth :—I do not go so far as Lord Loughborough. I put it this way. If so eminent a lawyer in discussing the right of the Crown to cede, went so far as to deny that a cession could lawfully be made by the Crown alone, even at the end of a war, and in the case of a desert and almost uninhabited country like Florida which had only recently been acquired by conquest, there is stronger ground for doubting whether such an act can be done in time of peace in respect of territory which has been long in our hands and which has been legislated for by Parliament. If Gogo can be so ceded, the whole Bombay Presidency may be ceded, and the only remedy would be impeachment. The right which I admit the Crown has to cede at the close of a war, and which I deny that it has in time of peace, rests on the exigencies of the case. These are clear after war has once been waged; till then they are speculative and contingent. Admitting the full power of the Crown to cede territory at the close of a war, there is, I think, no instance of a cession by the mere prerogative of the Crown of a territory operated upon by Parliamentary legislation.

1876

DANODAR

GORDHAN

,

DFOULAM

KANJIL.

1876
DANODAR
GORDHAN
v.
DEORAM
KANJI.

The Lord Chancellor.—Here is a convention between Her Majesty and the King of the Netherlands, by which we cede a portion of our territory on the Coast of Africa. That has nothing to do with a war, and that is territory upon which Parliament has operated by legislation, because there were two Acts of Parliament passed with reference to this very territory on the Gold Coast.

Mr. Forsyth.—I shall come to that case afterwards. I am speaking at present of treaties made at the close of wars.

The Lord Chancellor.—I thought you admitted that at the close of a war there might be right of cession.

Mr. Forsyth.—Yes. But I say it is a remarkable fact that there is no instance of a cession at the close of a war of territory operated on by Parliament.

Sir William Harcourt.—There are dozens.

Lord Selborne.—We have heard of one case at least—Florida.

Mr. Forsyth.—I have dealt with the case of Florida. *

Lord Selborne.—Still it is a remarkable instance, and all the more so from its not having been the subject of conquest or reconquest during the particular war at the end of which it was ceded.

Mr. Forsyth.—It had not been made the subject of any Act of Parliament.

Sir James Colville.—There must have been Acts of Parliament which applied to Newfoundland, and yet we seem to have ceded two islands on its coast, St. Pierre and Miguelon, first under the treaty of Paris in 1763, and again under the treaty of Versailles in 1783.

Mr. Forsyth.—I do not know how far Newfoundland has been affected by Acts of Parliament passed before the year 1763. An Act passed after 1763, when these cessions were made, would not touch the question. Assuming that the Crown's prerogative to cede territory at the end of a war does not extend to territory legislated for by Act of Parliament, *à fortiori* it has no power to cede such territories in time of peace. Of all the instances of cession which have been cited by the other side, that of Bencoolen

alone seems at first sight strongly against me. As to Bencoolen, it requires to be explained, though styled a Presidency, it was in fact a fort. In the treaty of cession the name Bencoolen is not used; it is spoken of as the Factory of Fort Marlborough. In 13 Geo. III, C. 63, it is mentioned as a Presidency in connection with the Presidencies of Bombay and Madras, and is no doubt thus recognized as a possession of the British Crown. That Act gave power to the Governor-General to make laws for these Presidencies, and prohibited them from engaging in war without his consent. I do not, however, find that, under the power thus given, any law or regulation was passed by the Governor-General, establishing institutions in Bencoolen.

1870
 MAY 11
 1870
 1870
 1870

The Lord Chancellor.—What institutions do you refer to?

Mr. Forsyth.—Municipal institutions. A Court of Justice, for instance.

Lord Selborne.—Surely if there is anything in your argument, it is the Act of Parliament, and not the Regulations made under its authority, which is of importance.

Mr. Forsyth.—Quite so. But I say that the mere naming a place in an Act of Parliament is a different thing from giving it institutions by Act of Parliament, or under Regulations having the authority of an Act of Parliament. Merely to name the place is not to legislate for it, and does not affect the power of the Crown to cede.

The Lord Chancellor.—I observe that the Act which gives power to the Governor of Bombay to make rules and regulations, gives an appeal against these to the King himself in Council who might repeal or alter them in any way he thought fit. That leaves the matter as it was. It is the prerogative of the sovereign to make rules and regulations, not of Parliament.

Mr. Forsyth.—What I say is that in respect of Bencoolen no such rules or laws have been made. Another case which has been referred to is that of the Bay Islands. These were outlying islands forming part of our territory of Honduras. They do not seem to have been made the subject of Parliamentary legislation and were simply in the position of a Crown colony. As to

1875
DAMODAR
GORDHAN
v.
DEORAM
KANJI.

Honduras itself, of which these islands formed a part, it appears (see "Cases and Opinions," p. 59) that in the year 1851, on a question arising whether the territory of British Honduras was a colony, island, plantation, dominion, fort or factory of Her Majesty within the Statute 13 and 14 Vic, C. 96, the Crown lawyers thought that the point was *not free from doubt*, though they eventually expressed an opinion that Honduras had then become part of the dominions of Her Majesty.

The Lord Chancellor:—The Bay Islands were not the same as British Honduras.

Mr. Forsyth.—I think they were included in the term Honduras.

Mr. Stephen.—They are entirely distinct. The islands are far to the south of Honduras. The letters patent recognize them as a separate settlement.

Mr. Forsyth:—That does not alter my argument. They were a settlement, but they had not been the subject of legislation. The next case is that of the Gold Coast. In respect of this territory there had been a sort of exchange between ourselves and the Dutch.

The Lord Chancellor.—You are not going to make another distinction—that there is a power by way of exchange but not otherwise.

Mr. Forsyth:—Oh, no. I say that no constitution was provided for the Gold Coast by Act of Parliament. Again, in respect of the Orange River Settlement, there was, in fact, no cession. The Crown merely revoked letters patent, by which it had a short time before established a form of government. The settlement was purely and simply a Crown colony, and had not been legislated for by Parliament.

The Lord Chancellor:—There are Acts of Parliament relating to the Gold Coast. By the Statute 6 and 7 Vic, C. 113, to enable Her Majesty to provide for her settlements on the Coast of Africa, it is declared that Her Majesty may delegate to three or four persons, within any of these settlements, power and authority to make regulations. This is not a constitution, but for the matter of that Bombay has no constitution. This Act was passed in 1843, and in 1867 a large cession was made of these very territories. In the

8th article of the treaty relating to this cession it is said that the convention shall be ratified after receiving, so far as may be necessary, the approval of the legislative authority. Has there been any approval by the legislative authority of the terms of this treaty?

1876

DAWODAR
GORDHAN
v
DEORAM
KANJI.

Sir William Harcourt —There has been no Act of Parliament.

Mr. Forsyth —The treaty, at all events, indicates that it might be necessary to have an Act. I do not understand why Parliament should have intervened by the Statute 6 and 7 Vic., C. 13, to give the Crown power to provide for the civil government of these settlements. I should have thought that the Crown had such power without authority from Parliament.

Sir William Harcourt :—The Statute 1 and 2 Geo. IV., C. 28, had vested the African possessions in the Crown. The territory having been vested in the Crown by Act of Parliament, it might require an Act of Parliament to enable the Crown to deal with it.

Lord Selborne :—There are two Acts of George II. relating to the African Company and expressly authorizing the establishment of Courts of Justice.

The Lord Chancellor :—The Act 6 and 7 Vic., C. 13, was probably required in respect of the rights which had been conferred by these other Acts on the African Company. It gave the Crown power to do what, but for the African Company's rights, the Crown might have done of its own prerogative.

Mr. Forsyth :—As to the other cases which have been referred to. It seems doubtful whether Dunkirk was ever annexed to the British Crown. See the impeachment of Lord Clarendon in the 6th Vol. of the State Trials. Tangier, again, was undoubtedly foreign territory, and was untouched by any Act of Parliament. The cession of Banca to the Netherlands in 1814 falls within the case of cessions made at the close of a war. We were not at war with the Netherlands; but a general war, in which both contracting parties were concerned, had just been concluded. The French, who had taken the island from the Dutch, held it up to the close of the war. It stood in the position of a conquest which we chose to restore. It had not been legislated for by Parliament. The cession of Guadeloupe to Sweden in 1813 under the treaty of

1876

DĀMODĀR
 GORDHAN
 v.
 DORAM
 KANJI

Stockholm was a similar transaction. It had been wrested by us from France in the course of the war. We held it as a conquest, and in 1813, as a part of a general arrangement in respect of the war, we ceded it to Sweden.

Sir James Colville.—It was not ceded at the close of the war, but as part of the consideration whereby we induced Sweden to join in the war against France.

Mr. Forsyth.—The object was to bind Sweden to the coalition against France, and so prepare the way to peace. As to the case of the Ionian Islands, our relinquishment of the protectorate of these islands has really no analogy to a cession of territory.

The Lord Chancellor.—The case of the Ionian Islands is not in itself much to the point. But as you have cited opinions delivered in Parliament in the last century, it deserves attention that Lord Palmerston, whose knowledge of these matters is well known, in speaking of the Ionian Islands, stated broadly in the House of Commons that the Crown had the right to cede any territory of which it was the possessor.

Sir Barnes Peacock.—He distinguishes, however, between those possessions which have been acquired by conquest or treaty and those settled by British subjects who carry with them the laws of their own country. The former may, the latter may not, be alienated.

Mr. Forsyth.—If that is his meaning, I agree with him, for I draw the same distinction.

Sir Barnes Peacock.—India is conquered territory.

Mr. Forsyth.—Not all of it. Our title in India is of a very mixed character.

The Lord Chancellor.—The territory we are now dealing with was ceded to us by the Peishwa under the treaty of Bassein.

Sir Barnes Peacock.—The Peishwa wanted our assistance against Seindiah and Holkar.

The Lord Chancellor.—Have you any instance of an application having been made to Parliament to authorize a cession of territory? If you find on the one hand certain instances in which cession has been made without the assent of Parliament, and on the other

hand can show no instance in which Parliament has been asked for or given its assent, that is a strong argument against you.

1876

Mr. Forsyth.—For a cession of conquered territory at the close of a war, I should not expect authority from Parliament. As to territory which has been legislated for, I say no such territory has been ceded. Instances of Parliamentary interference are, therefore, hardly to be looked for.

DÁMODAR
GORDJIAN
v.
DEORÁM
KÁNJI.

The Lord Chancellor.—Well, there are the two instances of Bencoolen and the Gold Coast.

Mr. Forsyth.—I admit the case of Bencoolen to be exceptional.

Sir William Harcourt.—There is another case which deserves notice. The cession of a large extent of territory in Canada to the Americans by the treaty of 1783. Canada was then under 14 Geo. III., C. 78, an Act for making more effectual provision for the Government of the Province of Quebec in North America.

The Lord Chancellor.—It may be said that the cession was part of an arrangement at the close of a war.

Sir William Harcourt.—But the territory had undoubtedly been legislated for.

Mr. Forsyth.—In adjusting our differences with the Americans it was necessary to settle a boundary line between them and our Canadian possessions.

Sir Barnes Peacock.—Do not these questions of boundary depend on the same principle as cessions, viz, upon the right of the Crown to cede? Otherwise it might be contended in a Court of Justice that the boundary had been wrongly fixed.

Mr. Forsyth.—A boundary treaty implies a dispute as to what are the proper geographical limits of our dominions. Until the boundary is fixed it is a matter of doubt.

Sir Barnes Peacock.—Your argument would seem to imply that, if the territory has been legislated for by Parliament, the treaty to determine its boundaries should be authorized by Parliament; where that authority has not been obtained, it would be always open to a subject to say in a Court of Justice that the boundary had been wrongly determined.

1876

DIMODAR
GORDHAN
v.
DEORIM
KANJI.

Mr. Forsyth:—I think that the case of the Crown being uncertain of its own right and, therefore, consenting that commissioners should be appointed to settle a line of boundary, is plainly distinguishable from the case of the Crown ceding territory which it knows to be British.

As to the question of allegiance. If the Crown has the prerogative to cede, what becomes of the allegiance of the transferred subjects of the Crown? The question of allegiance was considered in the case. *Doc dem. Thomas v. Archd.*⁽¹⁾ in which the question arose whether the child of a person born in the United States of America, after the declaration of independence, was an alien.

Lord Selborne held that he was an alien.

Sir M. Smith:—The same question arises whether the cession be made by Parliament, or by the Crown.

Mr. Forsyth:—No doubt, but you must have the supreme power somewhere. Parliament may, but the Crown cannot absolve me from my allegiance. That is the view expressed by Abbot, C.J., in the case cited.

The Lord Chancellor:—If the Crown can cede, it can absolve from allegiance.

Mr. Forsyth:—In the case of the Orange River Settlement, the Duke of Newcastle says, in his despatch, that the Crown cannot absolve the transferred subjects from their allegiance, and that an Act of Parliament would be needed for the purpose. He adds that he does not think the people of the territory will raise the question.

Lord Selborne:—The fact of cession *ipso facto* absolves from allegiance. In the case you cite it was held that there could not be a double allegiance.

Mr. Forsyth:—That was not the case of a person born in British territory. I submit that the Crown has no more right to absolve the subject than the subject had, until the passing of the Naturalization Act, to absolve himself. Again, the argument from the maxim "*feri non debuit factum valet*" that acts done by the Crown as representing the nation, in the face of the

⁽¹⁾ 2 B. and C. 779.

world, are binding on the nation, seems to beg the question. If the Crown has no power to cede without authority from Parliament, a foreign state, which treats with the Crown as possessing a prerogative which it has not, does so at its own risk. A state taking territory on such terms may have to defend it by the strong hand. If we obtained a cession of territory from the President of the United States without the concurrence of the Senate, the Senate would most probably repudiate the transaction. If the Crown does possess a plenary right in all cases to cede, it follows that it has it in India, but I do not admit that it has a fuller prerogative to cede in India than elsewhere. As to danger from holding that the Crown has no authority to cede in India, an Act of Parliament could be passed at once either to give it the power, or to give validity to past cessions. Assuming that the Crown has in itself no such power, has the Secretary of State, or the Government of India, a power to cede distinct from the power of the Crown?

The Lord Chancellor :—It is not so contended.

Lord Selborne :—Do you admit that this cession was intended to be made by virtue of an exercise of the Crown's prerogative?

Mr. Forsyth :—No, I do not admit that. I believe it to have been made by the Secretary of State and the Governor-General in Council, in the exercise, as they thought, of the powers which had been possessed by the old East India Company.

Lord Selborne :—We need not consider what they thought if the necessary authority exists.

Mr. Forsyth :—If your Lordships are satisfied that the Secretary of State acted in this matter as representing the Crown, and not under the powers given by 21 and 22 Vic., C. 106, I shall not trouble you further on that point.

Sir M. Smith :—I understood you to admit, that if the Crown could do it, the Crown had done it by exercise of its prerogative.

Sir Robert Collier :—I think it must be taken that the full power of the Crown has been exercised here. The only question is, had the Crown the power?

Sir Barnes Peacock :—I understand you to be instructed by the Secretary of State to argue the question of the Crown's right to

1876

DAMODAR
GORDHAN
" "
DEORAM
KANJI.

1876

DĀMODAR
GORDHAN
v.
DEORĀM
KĀNJI

cede; but you are not instructed by the respondent to give up any point which might entitle him to our judgment, which may depend on, whether there was, in fact, a cession. Do you admit that there was a cession?

Mr. Forsyth.—I say that the transfer was not a transfer of territory at all, but only a transfer of jurisdiction.

Sir William Harcourt.—The agreement for the transfer contained a reservation that, in the event of gross misconduct on the part of the Thakore of Bhaunagar, the territories should revert. How could they revert if they had not been given over? But I protest against this argument being raised, because it was understood that the fact of a cession was not to be disputed. But for that understanding I could easily have shown that there was an absolute transfer.

Sir Barnes Peacock.—Mr Forsyth admits a transfer of the villages, but not of the sovereignty.

Sir William Harcourt.—I was prepared to show your Lordships, but for the agreement to which I have referred, the facts on that part of the case.

Mr. Forsyth.—I protest against it being supposed that I have departed from any pledge given by me. I was not going to say a single word as to whether there had, in fact, been a cession, but I am bound to reply to the questions put to me by your Lordships. The letter of the 31st May 1865, from the Secretary of the Government of India, in the Foreign Department, to the Secretary to the Government of Bombay, shows the nature of the transfer contemplated.

The Lord Chancellor.—How do you account for the language used in the "Resolution" of the 28th January 1871?

Mr. Forsyth.—That is a mere statement on the part of the Bombay Government. It has not even the authority of the Governor-General in Council. But if your Lordships hold that what was done, was done by the Crown in exercise of its prerogative, I need not go into the question of the power of the Secretary of State, or of the Governor-General in Council, nor into an enquiry into the Acts of Parliament under which the Secretary of State exercised the power. None of the alleged acts of cession of terri-

tory in India prior to 1858, profess to have been made by the Crown. They are made by the Governor-General in Council. I have to challenge the existence of such a power.

1876
DAMODAR
GORDHAN
v
DFORÁM
KÁNJI.

Lord Selborne :—No one questioned it at the time.

Mr. Forsyth .—That does not prove that the power existed. The Acts of Parliament giving power to the Governments of the various Presidencies to make treaties, are 13 Geo. III., C. 63, and 33 Geo. III., C. 52. It is to be remembered that, from the year 1770 down to the year 1820, the East India Company were almost continuously engaged in warfare. Several of the cessions, which have been referred to, were made at the conclusion of wars, and are governed by the principle applicable to such cases. In other instances the territory ceded has not formed part of the Regulation Provinces.

Lord Selborne :—Do you say that the power to cede exists in respect of Non-Regulation Provinces? Could the Punjab be ceded?

Mr. Forsyth :—I think there is a distinction between Regulation and Non-Regulation Provinces. I do not say that the Punjab could be ceded; but I say, admitting that it might, it does not follow that Bengal could. Gogo is on a different footing from the Punjab. Besides being mentioned in the Regulation of 1827, it is dealt with in Act VI of 1859, which empowers the Governor of Bombay to appoint magistrates for specified districts within the zillah of Ahmedabad. The second section of the Act provides that nothing in the preceding section shall be held to remove the said districts from the jurisdiction of the Sessions Judge of Ahmedabad. There is a series of eight Acts of Parliament beginning with 7 George III., C. 57, and coming down to 3 and 4 Will. IV., C. 85, which successively vest the territories acquired in the East Indies in the East India Company. If the appellant is right in his contention, the Crown might repeal all these Acts of Parliament, by giving away all these territories to a foreign power.

Lord Selborne :—The Company might consent.

Sir James Colvile :—The cessions actually made, were made through the instrumentality of the Company.

Mr. Forsyth :—I do not deny that there was an acquiescence. I find no instance of protest.

1876

DĀMODAR
GORDHAN
v.
DEORĀM
KĀNJI.

Lord Selborne :—Where a cession takes place without objection, the jurists lay it down that the necessary consent is implied.

Mr. Forsyth :—That may be so, though I am not aware of any passage in which it is expressly said. I find that on two occasions, when it was thought desirable to cede territory in India, recourse was had to the Indian Legislature. Regulation XXII of 1812 was passed to authorize the restoration of territory to the Bondelah Chieftains.

The Lord Chancellor :—The terms of the Regulation presuppose the power of cession, and that it had been exercised, though for some purpose it was thought expedient to have a legislative declaration.

Mr. Forsyth :—There was no cession before the Regulation was passed.

Lord Selborne :—The recital shows that it had, at any rate, been decided on.

Mr. Forsyth :—What is done, is done by the Regulation. Again Regulation VII of 1816 recites that a tract of land in Bundelcund has been granted as an independent jaghir to Amrut Rao, and declares that it is consequently necessary that the operation of the laws and regulations of the British Government and the jurisdiction of the Civil and Criminal Courts of Judicature should cease to extend to that jaghir, and then proceeds to enact certain rules.

Lord Selborne :—Is the grant of a jaghir equivalent to the cession of territory?

Mr. Forsyth :—I think the jaghir would cease to be British territory if the grant is to an independent prince.

Lord Selborne :—An independent prince might hold territory within the British dominions.

Mr. Forsyth :—That is for your Lordships to decide. As to the case cited by Sir William Harcourt of cessions of territory in India, the cession of Broach to Scindiah in 1782 was made before the date of any Regulation. The Act of Parliament under which Bombay was authorized to make Regulations had not then been passed, and was not passed till 1807.

The Lord Chancellor :—Do you admit that before the passing of that Act of Parliament there was this power of cession?

1876

Mr. Forsyth :—Cessions took place. Whether under any legitimate authority, is the question to be determined.

DÁMODAR
GORDHAN
".
DORÁM
KÁNJI.

The Lord Chancellor :—We cannot take it for granted that all these cessions were *ultra vires*. We must regard them as the results of a constitutional power, defined and exercised in this way. To have full power over any territory includes the power of giving it up; otherwise the power is not full. You must establish the limitations to this full power. You may find them in Acts of Parliament, or in constitutional practice long continued, and never challenged, or in some original contract, such as the constitution of the United States of America, regulating the distribution of power. Where are we to find these limitations here? Looking at the thing as it stood in 1802, when Gogo first became British territory, do you say that at that time it could not have been ceded by the Crown and the East India Company?

Mr. Forsyth :—Distinctly not.

The Lord Chancellor :—Where are we to find that at that time there was any limitation upon the absolute power of the Crown to cede this territory? The Act of Parliament to which you have just referred, had not been passed, and the territory, as you admit, had not then been brought under any Regulation.

Mr. Forsyth :—I fall back on what I have throughout contended, that the Crown has not the power to cede; that there is no authority for assuming that it has such a power; and that the mere fact of things being done in times of war and disturbance, without scrutiny, is no ground on which to build so important a prerogative.

Lord Selborne :—Then you would say that Broach and the other places ceded are British territory still?

Mr. Forsyth :—If there be doubt, nothing can be easier than to pass an Act of Parliament to validate all cessions.

Sir Barnes Peacock :—Is not all doubt removed by Section 67 of 21 and 22 Vic., C. 106?

Mr. Forsyth :—All treaties were made binding.

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1876

DANODAB
GORDHAN
v.
DFOKIM
KANJL.

The Lord Chancellor.—Any treaty that was invalid as against the Company would still be invalid as against the Crown.

Lord Selborne.—The obligations of the Company are taken over by the Crown. But here, you say, there is no obligation.

Mr. Forsyth.—The observation as to the effect of the Act of 1858 was not mine. To return to the instances of cession which have been referred to by Sir William Harcourt in his argument, or which have been printed as part of the appellant's case. No Regulation applied to the fort and district of Kulandelly ceded by the Madras Government to the Chief of Poodoocotah in 1803, and the same may be said of the territory restored to the Maharajah of Nagpore in 1806.

Sir Mr. Smith.—That was a gift made in time of peace. There was no pressure arising from any war at that time. The territory ceded had been for three years under British Government.

Mr. Forsyth.—There was no Regulation. The case of Jeytpore in 1809 (*Atchison's Treaties*, Vol. III, p. 174) was simply a jaghir grant. The Rajah had handed in an obligation of allegiance, and was in fact a British subject. The case of Behree in 1811 (*Ibid.*, Vol. III, p. 329) seems also to be a case of jaghir.

Sir M. Smith.—It rather looks as if these villages were withdrawn from the Regulations of the British Government.

Mr. Forsyth.—It is somewhat obscure. Pergunnah Nababgunge, which we gave up to Oudh in 1816 (*Ibid.*, Vol. II, p. 164), had been acquired by us in 1801 as part of the district of Goruckpore. It does not seem to have been made the subject of any Regulation up to the time when it was ceded. The cession to Sikkin in 1817 of territory taken from Nepaul (*Ibid.*, Vol. II, p. 205) was made shortly after the close of a war, and as part of an arrangement entered into in consequence of that war. It is not pretended that the Regulations applied there. The cessions to the Gaikwar in 1817 (*Ibid.*, Vol. VI, pp. 331-339) were the result of a settlement of boundaries at the close of a war.

Lord Selborne.—It would seem rather from the words of the treaty with the Gaikwar, that the adjustment made was not in the sense of a settlement of disputed boundaries, but of a consolidation of territories under the British Government, to effect which certain

British territories were given up. I do not understand that these were conquered territories, or that there was any dispute about them.

Mr. Forsyth :—The war was over. We wished to settle matters with the Peishwa and the Gaikwar who had assisted us.

Lord Selborne :—But this territory does not seem to have been in contest during the war.

Mr. Forsyth :—I cannot say. It seems to me to be a case of adjustment of territory following the close of the war with the Mahratta power. The treaty with Scindiah in 1818 (*Aitchison's Treaties*, Vol. IV, p. 253) appears from its preamble to have been made for the purpose of adjusting boundaries at the close of a war by an exchange of territory. The sunnud granted in 1820 to the Rajah of Gurhwal (*Ibid.*, Vol. II, p. 59) restored to him territory of which he had been deprived by the Goorkhas, and which we had conquered in our war with Nepaul. The territories given to the Nizam in 1822 (*Ibid.*, Vol. VI, p. 92,) were granted in recognition of the services rendered by his army in the Pindari and Mahratta wars of 1817; exchanges were at the same time made to secure a well-defined frontier.

Lord Selborne :—Some of the territories ceded had been held by the English Government for more than four years.

Mr. Forsyth :—They were territories recently conquered, and in which the authority of the British Government had never been practically established.

Lord Selborne :—You have presented us with no facts to lead to that conclusion, except that these were not Regulation Districts.

Mr. Forsyth :—In 1822 we restored to the Rao of Cutch (*Ibid.*, Vol. VI, p. 444) the town and district of Anjar, which had been given up to us in 1816, and which we had held from that date without bringing it under any Regulation. Exchanges of territory with the Kolába State in 1827 (*Ibid.*, Vol. VI, p. 183,) had been provided for by a treaty entered into with the Chief of that state in 1822, at the close of the war with the Peishwa, and were made with the object of defining the boundary. In 1829, in exchange for certain land required for a station at Cherra Punji, we gave up to the Rajah of Cherra Punji an equal quantity of

1876
DAMODAR
GORDHAN
" "
DEORAM
KANJI.

1876
DÁMODAR
GORDHAN
v.
DEORÁM
KANJI

land in Sylhet (*Ibid.*, Vol. I, p. 89). It does not, however, appear that the land had a single village on it. The case may resemble that of the Crown lands in this country which the Crown may do as it likes with. As to the cession in 1829 of the British village of Kundla to the Rajah of Satana (*Ibid.*, Vol. VI, p. 20,) in exchange for lands required for a sanitarium in the Mahableshwar hills, I think I may make my learned friends a present of that village.

Lord Selborne.—You are generous at the expense of the principle of your argument. Where is Kundla?

Mr. Forsyth.—In the map it is close to Konkan, and Konkan was obtained from the Mahattas in 1818.

Lord Selborne.—It so, we had held it for eleven years. It can hardly be presumed that for eleven years it was without Courts of Justice.

Mr. Stephen.—It is in the District of Wai in the District of Konkan, which is expressly subject to Regulations

The Lord Chancellor.—It seems to be a clear case of cession.

Mr. Forsyth.—I do not deny the fact. Again, in the year 1830, the hill-station of Simla was obtained from the Rajah of Puttiala in exchange for three villages in the Peigunnah Burrowli. No treaty was recorded. Is it contended that the Crown can cede without treaty?

Sir William Harcourt.—Yes.

Lord Selborne.—It was a transaction.

Mr. Forsyth.—A transaction, but not a treaty. I do not say that Burrowli was not under Regulations. I say there was no treaty.

Lord Selborne.—The possession of the hill-station of Simla was of great importance to British India, and our title to it depends on that cession.

Mr. Forsyth.—I shall say nothing of the agreement made in 1830 for an exchange of territory with the Punt Sacheo (*Ibid.*, Vol. VI, p. 43,) for I have no means of ascertaining what territory was transferred under that agreement. Nor can I find any treaty or other authority for the restoration of Bairsea to Dhar in the year

1831. Assam was conquered from the Burmese in the war of 1825-26. In 1831 a portion of the conquered territory was ceded to Rajah Purunder Singh (*Ibid.*, Vol I, p. 132). The management of the country was afterwards resumed by the British, the Rajah having failed to meet his engagements. At the time the cession was made the country had not been made the subject of legislation. The first legislative measure passed for settling the Province and Government of Assam was Act II of 1835.

1876
DĀMODAR
GORDHAN
"DEORĀM
KANJI.

Sir William Harcourt :—This case is referred to in Mr. Forsyth's "Cases and Opinions" as a case of cession.

Mr. Forsyth :—In 1833 we restored to the Rajah of Nahun territory known as the Kearda Doon (*Aitchison's Treaties*, Vol. II, p. 325). We had retained Kearda Doon in our possession for 18 years, but I am not aware that we had made it the subject of any Regulation. The restoration in 1846, to the Rajah of Nálá-gurh, of the fort of Malown with six villages, which had been received from him in 1815 (*Aitchison's Treaties*, Vol. II, p. 333,) and the restoration in 1856 to Holkar of the fort of Sindwa, which had been ceded to us in 1818 (*Aitchison's Treaties*, Vol. IV, p. 294,) are much on the same footing as the restoration to the Rajah of Nahun.

With respect to cessions since the great Indian Mutiny, I do not dispute that since that time the Indian Government has over and over again made gifts of territory to Native chiefs in reward of their fidelity. That is the very thing I am here to challenge. Neither the Governor-General in Council nor the Crown can, by a mere exercise of the executive power, give away territory which has been under Regulations, or under an Act of Parliament establishing municipal institutions or Courts of Justice. I admit that the principle of such cessions has never been questioned in a Court of law till it came to be considered in the present case. Having to consider it now, the Court has decided against the prerogative claimed. The Crown can only cede conquered territory at the close of a war, and as the price of peace.

The Lord Chancellor :—Suppose the termination of a war in which we have been completely victorious, and there is no price to pay for peace, but the Crown is minded to restore some part of territories which it has conquered. Can it do so?

1876

DIAMODAR
GORDHAN
v.
DIORAM
KANTI

Mr. Forsyth.—Certainly, in the case of conquered territory.

The Lord Chancellor.—But that would not be the price of peace.

Mr. Forsyth.—It is the prerogative of the Crown to make war and peace, and to judge of the reasons for war, and the terms on which peace shall be made. In the exercise of these powers the Crown may, I think, give up conquered territory at the close of a war. I will not add as the price of peace, but say simply for the purposes of peace.

Lord St. Leonards.—In your argument on some of these cases you go a step further, and admit that at the close of a war the Crown may deal with territory in favour of persons who have not been opposed to it in the war.

Mr. Forsyth.—I do not dispute that we may impose on our enemies cessions to our allies, or that we may cede directly to our allies territory which we have taken from the enemy.

Sir J. Colvile.—If you admit that the Crown may give up British territory, you give up the whole case.

Mr. Forsyth.—I do not make that admission.

Sir Barnes Peacock.—The Crown after conquest has power to make laws for conquered territories, and possibly so long as it has that power, the Crown may cede these territories. Can the Crown make laws for the country after Parliament has legislated for it and given it a constitution? If the Crown can no longer make laws, can it cede?

Mr. Forsyth.—Certainly not. That is the point I am coming to.

The Lord Chancellor.—What is meant by a constitution?

Mr. Forsyth.—If Parliament has established laws, it does not seem to matter whether it has given a constitution or not. It is enough that it has legislated.

The Lord Chancellor.—Is there any magic in legislation? According to our constitution when the two Houses of Parliament express their desire that a certain measure should be passed, the sovereign is in the habit of acceding to that desire and passing the measure. Assume the sovereign to be in possession of con-

quered territory with all the absolute powers resulting from conquest, including the power of cession. The Houses of Parliament address the sovereign, and say "we are anxious, with your assent, to pass an Act to establish Courts of Justice and appoint Judges for administering the law in this territory." The sovereign assents and says "let there be Courts, Justice, and Judges." What does this take away from the sovereign?

1876

1876
DANODAR
GOERHAN
DFOAM
KANTH.

Mr. Forsyth.—The concurrence of the estates of the realm with the sovereign declare the will of the nation which is above the Crown.

The Lord Chancellor.—The Crown assents to the request of the Houses of Parliament that so long as these territories are held by the Crown there shall be Courts of Justice to administer the law. But that does not advance your argument. If you have absolute power in the Crown, you must get it out of the Crown, otherwise it remains absolute.

Sir M. Smith.—Can you contend that after an Act of Parliament has passed, establishing Courts of Justice in a certain territory, that territory could not be ceded by the Crown, even at the close of a war?

Mr. Forsyth.—That is my second proposition. I say there is no instance of a cession by the Crown, at the close of a war, of territory for which Parliament has legislated by granting institutions.

Lord Selborne.—You mean to say that although there are instances, they are invalid; because Bencoolen and the Coast of Africa are distinct instances.

Mr. Forsyth.—I am now dealing with the case of the close of a war. These were not cases of that kind.

Lord Selborne.—Then Canada is a case in point. Districts of Canada which we had held for a considerable time were ceded at the close of the war in 1783. Is there any doubt that Canada had been legislated for by Imperial Acts?

The Lord Chancellor.—Then there was the cession of Florida. That was at the close of a war, and legislative power had been applied there.

1876

DAMODAR
GORDHAN
v.
DEORAM
KANJI.

Mr. Forsyth.—I cannot find that there was any legislation with regard to Florida. The country was almost a desert.

Lord Selborne.—It being a desert, would make no difference.

Mr. Forsyth.—If it had been a flourishing community, we should have given it Courts of Justice. We held it only for three years, and gave it over to Spain in the same state we received it.

Lord Selborne.—It is provided by the statute of Elizabeth, commonly known as the Supremacy Act, not only as to all existing dominions of the Crown, but also as to all future dominions, that no foreign prince, prelate, or potentate shall have authority therein. Has that any bearing on your argument? Would you say that the moment territory becomes British, it is touched by that statute?

Mr. Forsyth.—I have never used that argument. That statute seems to me to be directed only against the Pope's authority, to prevent his exercising jurisdiction within the realm of England. We must look to the object of the Act.

Sir M. Smith.—If we look to the object of Acts establishing Courts of Justice, can we say that these were intended to interfere with the prerogative of the Crown?

Mr. Forsyth.—When Parliament has given to the subjects of the Crown certain rights, the Crown cannot take them away.

The Lord Chancellor.—Suppose these rights to have been given directly by the Crown itself to the inhabitants of conquered territory, could not the Crown take them away?

Mr. Forsyth.—I submit not. But my argument does not require me to deny that it might. I say, when Parliament has intervened, the Crown is in a different position.

Sir William Harcourt.—With respect to Florida, it appears from a passage in the "Annual Register" that at the time it was ceded, it had a provincial assembly which had addressed the king in terms of the strongest attachment and with professions of abhorrence for the American rebels and the Spanish Government.

Mr. Forsyth.—No doubt Florida had some kind of Government of its own when it was ceded to us. It did not get it from Par-

Sir M. Smith —When we got Florida we must in some way have ratified the Government.

Mr. Forsyth :—Things remained as they were. The territory changed hands two or three times. If the Crown grant representative institutions to what has been a Crown colony, it is admitted that it cannot afterwards cede it. Why should not the same be the case with regard to territory in which Courts of Justice have been established? The nature of the internal government of the colony cannot alter its external relations.

The Lord Chancellor —The difference, according to some writers, lies in the effect of the representative institutions in altering the distribution of power. After the grant of a constitution power is differently distributed. The plenary dominion of the Crown is affected. But the establishment of Courts for the due administration of justice does not in any degree alter the distribution of power.

Mr. Forsyth :—It is not clear to me why the rights of the Crown should be affected, and its plenary power diminished by the grant of a constitution which it might give or withhold at pleasure, and yet should not be affected by the establishment of Courts of Justice. But, at any rate, India is not a Crown colony, since it has been legislated for by over seventy Acts of Parliament in less than hundred years.

Lord Selborne :—You do not mean to say that the Crown colony may not be legislated for by any number of Acts of Parliament. Most of them are so more or less. We have instances in the Gold Coast, Bencoolen, and Canada. The case of the Gold Coast seems exactly parallel with the present case. The African Company was on the same footing with the East India Company, the action of Parliament was similar, and the action of the Crown was similar.

The Lord Chancellor.—In one way it is a stronger case. The African settlements were treated as settlements, and not as ceded or conquered territory; and it was necessary for the Crown to have power from Parliament to make laws to bind the settlers.

Mr. Forsyth :—If a territory or colony for which Parliament has legislated can be ceded by the Crown, no sound distinction can be drawn between the present cession and that of any part

1876
DAMODAR
GOKDHAN
B.
DIORAM
KARJI

1876
 DAMODAR
 GORDHAN
 "DORAM
 KANJI.

of the British dominions. This was admitted by Mr Stephen, when on being pressed by your Lordships he said that the Crown could cede the Isle of Wight. The prerogative of the Crown in India is not different from or greater than in Great Britain, or any other part of the Queen's dominions. As regards the power of the Crown to make treaties, the limitation is that there must be nothing therein contrary to the standing laws of the realm. These, as I have endeavoured to show, forbid the alienation of territory for which Parliament has legislated. If the Crown's prerogative to cede were as wide as it is here claimed to be, Parliamentary impeachment would be a poor guarantee against its abuse. It is, perhaps, desirable that in India power should be given by Act of Parliament to be exercised by a responsible authority for making exchanges and even cessions of territory. By such an Act proper limitations to the exercise of the power would be imposed.

Mr. J. D. Bell, on the same side:—Mr. Forsyth has dealt with the treaties entered into by the East India Company before the year 1858. I propose to direct attention to the effect of the Act, 21 and 22 Vic, Cap. 106, by which the Government of India was in that year re-transferred to the Crown. Section 1 of that Act vests the territories of India in Her Majesty absolutely, and provides for their government through certain officers for whose appointment it provides.

Lord Selborne —At that time there was a charter of Government to the East India Company, which had been granted or confirmed by Parliament. Therefore, what is transferred to the Crown is what Parliament had vested in the East India Company.

Mr. Bell.—I think the charter had expired.

Sir J. Colvile —The charter of 1834 had expired, but then it had been renewed by the charter of 1855.

The Lord Chancellor :—You must bear in mind the effect of 55 Geo. III, Cap. 155, Section 95, which provides that nothing in the Act contained shall prejudice or affect the undoubted sovereignty of the Crown of the United Kingdom over territories acquired in India.

Mr. Bell —Quite so. What I would point out is that the Act of 1858 gives to Her Majesty the sole Government of the East

India territory, but subject, as I submit, to the terms of the Act itself. The next step taken was to give (in 1861) by the 24 and 25 Vic., Cap. 104, power to Her Majesty to create, by letters patent, Courts of Justice in India, and by her orders in Council, from time to time to transfer any territory or place from the jurisdiction of one High Court to another. Under the powers conferred by this Act Her Majesty was pleased to grant the charter of 1862, by the 15th Clause of which jurisdiction was given to the High Courts in India to entertain appeals from all Courts which previous to that time were under the Sudder Courts of the Presidencies. In 1865 a new Act of Parliament was passed, 28 Vic., Cap. 15, by which (Section 3) Her Majesty was authorized to grant fresh letters patent, but which took away and made over to the Governor-General the power, which had before been given to Her Majesty, of transferring, by order in Council, territory from the jurisdiction of one High Court to another. A new charter in accordance with the powers contained in this last-mentioned Act was issued in the same year (1865). The cession of territory now under consideration took place on the 1st February 1866.

1876
DÁMODAR
GORDHAN
v.
DORÁM
KÁNJI.

Sir Barnes Peacock.—That was the date of the notification. The agreement entered into by Sir George Clerk was dated in 1860.

Mr. Bell.—The notification in the *Gazette* fixes the 1st February 1866 as the date when the cession took place. Consequently it dates subsequent to the last charter issued by Her Majesty. I submit that when power is given by Act of Parliament to Her Majesty to legislate in this way, and she has accordingly by charter placed a particular district under the superintendence and control of a particular High Court, she has no further powers, except under authority given by Parliament, to transfer that district to any other jurisdiction, whether within or without her own dominions. The case of *Campbell v. Hall*⁽¹⁾ supports this view. It was there held that where the King had, by letters patent, given the people of British Granada authority to conduct the government of their colony, he could not afterwards, by an order in Council, impose a tax.

The Lord Chancellor.—What was the form of the constitution of British Granada?

⁽¹⁾1 Cowp. 204.

1876
 —
 DAMODAR
 GORDHAN
 v.
 DEORAM
 KANJI

Mr. Bell. A Governor was appointed with power to summon an Assembly, who, with the assent of the Governor, should make laws.

The Lord Chancellor.—That was held by the Court to be a grant by the Crown of a right to legislate, and to legislate with regard to the imposition of taxes.

Mr. Bell.—And then His Majesty by an order in Council imposed a tax.

The Lord Chancellor.—And that was held to be opposed to the power which the Crown had granted.

Mr. Bell.—So here I contend that Parliament having given Her Majesty power to create particular Courts, and having taken from her the power which she had before to transfer territory from these Courts, she having exercised the power of creating Courts is debarred from exercising the farther power of transferring them, by an order in Council, or an order of the Secretary of State, which amounts to the same thing.

Lord Selborne.—You argue as if this were a case of transferring territory from the jurisdiction of one High Court to that of another. The Act you refer to has nothing to do with a transfer to the jurisdiction of a foreign Court. The jurisdiction spoken of is British jurisdiction.

Mr. Bell.—I say that if legislative authority is needed to authorize the transfer of territory from the jurisdiction of one British Court to that of another, much more is it needed to authorize a transfer away from British jurisdiction altogether. The relinquishment of the Government of a country is a relinquishment of authority over its inhabitants: *Doe d. Thomas v. Acland*.⁽¹⁾ Can the Crown deprive the inhabitants of a territory, which Parliament has placed under its charge, of the protection and other advantages which it derives from its position? If it should be held that the Crown has power to alienate without the consent of Parliament, the question as to the operation of the Evidence Act is not material. But if the Crown has no such power, it

is important to notice that the effect of the judgment of the lower Court is to decide that a notification published, as this has been, in the *Gazette of India* does not debar Courts of Justice from enquiring whether or not there has in fact been a cession.

1876
DANODAL
GORDHAN
v.
DIPCHAM
KASJI.

The Lord Chancellor.—Is the Evidence Act of any materiality here except as a means of arriving at a knowledge of the fact whether there has been a cession? It has not been argued for the appellant, either here or in India, that the Court is debarred by the Evidence Act from looking into the cession.

Sir J. Colvile.—The Court held that if the Crown has no power to cede without authority from Parliament, it follows that Section 113 of the Evidence Act is *ultra vires* of the Indian Legislature, and then *cadit questio*. But that if the Crown possesses the power, the Evidence Act supplies a valid means of proving its exercise.

Mr. Bell.—I understood Mr. Stephen to say that the effect and object of the Evidence Act was to close all enquiry into the facts of the case.

Sir William Harcourt.—That is not our contention.

The Lord Chancellor.—We are not technically concluded by evidence of this kind.

Mr. Bell.—It is then unnecessary for me to refer to the case of *Biddell v. Turanichurn Bonnerjee*.⁽¹⁾ If the Queen has power without authority from Parliament to dismember her Indian dominions, why was the Statute 29 and 30 Vic., Cap. 115, passed? That was an Act to provide for the Government of the Straits Settlements. It recites that the Straits Settlements, the Island of Singapore, the Town and Fort of Malacca and their dependencies, were heretofore part of the territories in the possession and under the Government of the East India Company, and became vested in Her Majesty as a part of India by virtue of the Act of 1858. It then goes on to say that it is expedient that these territories should cease to form part of India, and should be placed under the Government of Her Majesty as part of the colonial possessions of the Crown.

⁽¹⁾ 1 Taylor and Bell.

1876
 DAMODAR
 GORDHAN
 v.
 DFORAM
 KANJI.

The Lord Chancellor :—By the Act of 1858, Parliament had declared that the Queen's Indian dominions, including the Straits Settlements, should be governed under that Act by the Indian Government. To enable these settlements to be governed by a different department, namely, the colonial, it was necessary that Parliament should authorize the change. That is not a question of cession, but a matter of departmental government.

Mr. Bell.—I should have thought that, if the Crown could cede territory by an order in Council, it might, by a similar exercise of its power, transfer territory from the control of one department to that of another, without requiring the consent of Parliament.

Lord Selborne :—The Act of 1858 expressly regulates the mode in which Her Majesty's Indian Government is to be carried on. The Straits Settlements would necessarily be governed under the Act, until taken out of it.

The Lord Chancellor :—If the Act of 1858 had expressly enacted that, so long as the Indian territories of Her Majesty shall not be ceded to any other power, they shall be governed in a way named, and afterwards you wanted to have them governed in a different way, clearly you would require another Act of Parliament. As to the right of cession itself, the question is whether it is not paramount to the provisions of the Act of 1858? If so, it is necessary to express it in the Act.

Mr. Bell :—If Her Majesty can cede a portion of her Indian territories she might transfer the whole territory of India to a foreign power, although in doing so she would sweep away the whole administration provided by this Act of Parliament.

Lord Selborne :—You say that a power of cession is incompatible with the Act of 1858. May it not equally be said that it is incompatible with the Act of Parliament constituting the East India Company? I see no distinction. In both cases the Government of India is the subject of parliamentary regulation.

Mr. Bell :—I think a distinction may be perceived in the fact of the whole sovereignty being vested in the Crown under the

Sir William Harcourt, in reply:—In addition to the authorities already cited reference may be made to Mr. Justice Story's "Constitution of the United States," Book III, Cap. 37, Sections 1503, 1504, where he gives reasons why the power of making treaties should not be vested in the Legislature. Another American constitutional writer, Alexander Hamilton, in a treatise in which he contrasts the prerogative of the King of England with the power given to the President of the United States by the American Constitution, observes that the King of England is the sole and absolute representative of the nation in all foreign transactions and treaties, and that his conventions are neither subject to the revision, nor stand in need of the ratification of Parliament, although Parliament has sometimes to co-operate to make the working of the treaty practicable by altering existing laws. This explanation of the action of Parliament is more precise than Wheaton's loose expression as to treaties requiring "the approbation of Parliament." These words are not intended to imply "legislative sanction," but merely a vote of approval of the conduct of ministers in making a treaty.

1876

DANODAR
GORDHAN
".
DURAM
KANJI.

The question as to whether the present was a case of cession at all, has arisen from the words used in the "notification" of the Bombay Government, wherein the transaction is spoken of as a transfer from the ordinary jurisdiction of the Court to the supervision of the Political Agent. A Political Agent is a diplomatic officer. If it were said that the people of Jersey had been transferred to the supervision of the British Ambassador at Paris, it would be implied that Jersey had been given over to France. The office of the Political Agent does not connect itself in any way with British territory. He represents the Government of India at the Courts of Native sovereigns, and although, from our peculiar relations to the Native sovereigns, of India, the Political Agent has larger powers than the ordinary Ambassadors of European states, the statement that territory has been handed over to his supervision is merely equivalent to saying that it has been ceded to the state in which he is placed as agent. The transfer of jurisdiction is the natural and inevitable consequence of a cession, and could not take place without a cession, because, without ceding, the Crown has no power whatever to transfer

1876 territory from the jurisdiction of the ordinary Courts of Justice to that of the Political Agent. In the case of this cession to Bhan-nagar, it may be taken that British subjects complaining of ill-usage would have a sort of political and diplomatic appeal to the Political Agent. This in itself involves the idea of cession. Why is recourse had to the Agent, but because the territory has ceased to be British, and the ordinary jurisdiction has in consequence ceased to be exercised?

DANODAR
GORDHAN
v.
DFORAM
KANJI

As to the right of the Crown to make treaties involving cession, it has been admitted on behalf of the respondent that the Crown may make such treaties where there is a *vis major*, but not otherwise. But it has been pointed out that such treaties are made by victorious as well as by vanquished states, and that the victors have constantly ceded territory. Thus in 1763, after the great triumphs of Lord Chatham, England ceded to France territories which need not have been ceded. And so, in 1814, France received back all her colonies, and Java and Sumatra were restored to the Netherlands. These restorations were not made under the pressure of superior force, but voluntarily and for reasons of state policy on the part of England. *Vis major*, therefore, is not the test, and cessions made at the close of a war are on no different footing from cessions made in time of peace, but are equally regulated by considerations of policy. A change of allegiance is recognized to be the natural result of cessions of territory, and is specially provided for in the treaty of 1815, which, like the treaty of 1814, was concluded and proclaimed on the sole authority of the Crown, without waiting for the approval of Parliament.

There are, indeed, certain treaties in which the assent of Parliament is asked for, and in these cases it is stated in the treaty itself that it shall not take effect without the consent of Parliament. Thus, the approval of Parliament is essential in all treaties relating to money, as in the case of loans. That the consent of Parliament is invariably required in money treaties, and is never stipulated for in treaties of cession, is a strong argument that such consent is not essential to give validity to treaties of the latter class. Extradition treaties are also made subject to the consent of Parliament, and in various instances

Parliament has refused its consent, and the treaties have been rejected. In various treaties of commerce the ratification of Parliament has been made a condition, and in some instances ratification has been withheld. That no treaty for a cession has been broken down by reason of Parliament refusing its approval, is a strong argument that Parliament has no authority to reject such treaties.

1876

DAMODAR
GORDHAN
v.
DEO BÄM
KÄNJI.

No doubt, where a constitutional Government exists in the territory to be ceded, the representative body ought to be consulted. But here the appellant contends, not merely that the representative body should be consulted, but that its authority is to be given in the shape of legislation. That is not the form in which Parliament acts when consulted in respect of treaties. The only case in which Parliament might, at first sight, appear to have interfered by legislation in respect of a treaty, is the case of the treaty in 1783 at the close of the war for American Independence. But it interfered then, not on the ground that territory was to be ceded, but because the persons with whom the convention was to be made, had by previous Acts of Parliament been declared rebels, and liable to every kind of penalty. The Crown stood to the rebels much in the same position as it stood to the Pope before the Act of 1848. If, for any reason, it had been desired, before the passing of that Act, to transfer territory to the Pope, the cession could not have been made by the Crown, because dealing with the Pope was forbidden by *premunire*. To enable the Crown to negotiate a treaty with the Americans, an Act of Parliament was necessary. But that Act gave no authority for the cessions to Spain and France; and these cessions, so far from being approved by Parliament, were condemned by Parliament as unnecessary. No one, however, has contended for a moment that these cessions were not valid.

The difficulty with regard to allegiance arises in all cases of cession of territory which has once been British, whether such cession be made under the pressure of a *vis major* or not.

If effect were given to the contention that all the numerous cessions made in India since the Mutiny have been *ultra vires*, the result might be disastrous. These cessions had been made to

1876
 DĀMODAR
 GORDHAN
 v.
 DEORĀM
 KĀNJI.

reward the loyal and to punish the rebellious, in accordance with those considerations of public policy which ought always to determine the exercise of the Crown's prerogative, and which must be attended to in time of peace as well as in time of war. Rearrangements, exchanges, and cessions of territory may be expected, for the most part, to be made after a war, and not in times of continued peace. Yet we do find instances of treaties of cession made in times of peace, as in the cases of Bencoolen, Florida and the Gold Coast. The case of Bencoolen is absolutely *in pari materia* with Bombay, since in an Act of Parliament, which has been referred to, the three Presidencies of Madras, Bombay, and Bencoolen are named together. Bencoolen was legislated for as Bombay was; and when it is asked could the Crown cede Bombay? it may be answered, if it cannot, how could it cede Bencoolen?

Florida, which has been represented by Mr. Forsyth as a desert, was in our possession for nearly 20 years, and possessed a Provincial Assembly. It is not likely that it received this form of government from Spain. My impression is that the Provincial Assembly was the creation of England, and that Florida came under the same rule as the other plantations. With reference to the Indian cases, there is no force in the distinction that territory which has not been dealt with by Regulations, *can*, while territory which has been so dealt with, *cannot* be ceded. The inhabitants of the British territories in India are under the Government of the Crown, and it is immaterial what particular form that Government may assume. The British Parliament is in no way representative of Gogo. In territories without representative institutions the Crown represents the inhabitants, and there can be no question of any other authority, save that of the Crown, being brought into action. Mr. Bell has argued that as certain statutes have been passed to authorize the Crown to change the jurisdiction of the High Courts of the different Presidencies *inter se*, it must, *a fortiori*, be necessary to have Parliamentary sanction to a cession the effect of which is to exclude the jurisdiction of all the High Courts. This does not follow. The Crown by itself could cede Minorca, although it cannot, without an Act of Parliament, change the assizes from Yorkshire to Cambridge. While territory re-

the Crown cannot change a rule as to jurisdiction which has been authorized by Parliament, or transfer to one department of Government territory which Parliament has entrusted to the government of another department. The Crown could not alter the boundaries of Yorkshire, or give a part of Yorkshire to Cumberland.

1878

DĀMODAR
GORDHAN
v.
DEORAM
KĀNJI.

Sir Barnes Peacock :—If the Crown could not give it to Cumberland, could it give it to France?

Sir William Harcourt :—England has been so happy in her history that we have no examples of a cession of an intergal part of the territories of the United Kingdom. But as to possessions of the Crown out of the United Kingdom, there is a series of examples. Of all the hundreds of cessions made in India, no single instance is pointed out in which the assent of Parliament was asked for or given. Can any constitutional argument be more completely established? The present question is entirely a constitutional one, and I submit that all the constitutional authorities are agreed in holding that the right to cede is the prerogative of the Crown.

Sir Barnes Peacock :—There are one or two points on which I feel a difficulty,—*first*, as I understand your argument, Gangli as a part of Gogo has become foreign territory and has passed in full sovereignty to the Thakore of Bhaunagar.

Sir William Harcourt :—I would omit the word “full,” because no Native prince, as I think, has full sovereignty in India.

Sir Barnes Peacock :—Well, the sovereignty of the British Crown has ceased to exist, and with it British Courts of Justice have ceased to exist.

Sir William Harcourt :—The sovereignty of the Crown has no more existence in Gogo than it has in the territory of Scindiah or Holkar or of the Gaikwar of Baroda. The Queen exercises a general suzerainty over the Native princes of India.

Sir M. Smith .—She keeps an eye on them.

Sir Barnes Peacock :—Has the Crown given up such prerogatives as that of coining money in, or of passing troops through, Bhaunagar?

1876

DÁMODAR
GORDHAN
DEORÁM
KÁNTI.

Sir William Harcourt :—I say that the Crown's power to legislate for Gogo has ceased. The Indian Legislative Council, which before the cession could have made laws for Gogo, can do so no longer. The authority of the ordinary British Courts of Justice has also ceased, and those who before might have sought remedy or redress in these Courts, must now have recourse to the Native Courts, or, in the event of any gross or glaring act of injustice, may apply for the protection of the Political Agent. The British Crown has now only such authority in Gogo as it has, through its Political Agent, in Baroda.

Sir Barnes Peacock :—At the time of the passing 21 and 22 Vic., C. 106, Gogo was territory in possession of the East India Company. By Section 1 of that Act that was transferred to Her Majesty. By Section 2 it is provided that territory thus transferred shall be governed by and in the name of Her Majesty. Can it now be governed by and in the name of the Thakore of Bhaunagar?

Sir William Harcourt :—The original title to all this territory was in the Crown, but prior to 1858 it was subject to authority vested in the East India Company. The real effect of the Act of 1858 was to abolish the authority of the East India Company, and to restore and re-instate the original title of the Crown. The Queen, therefore, did not take Gogo under the Act of 1858. It was a part of her territories before, but subject to the Government of the Company, which that Act put an end to. The position of the Crown may be compared to that of a minor whose guardianship terminates, and who comes into full possession of his estate when he comes of age. While the Company existed, the Crown was under a kind of disability. On the abrogation of the Company, it came into full possession.

Sir Barnes Peacock :—Another question which occurs to me is this. You say this is foreign territory, and, consequently, that the jurisdiction of the High Court had ceased. If we reserve the decision of the High Court, what judgment ought we to give? All that the High Court say in that judgment is that they refuse to interfere with their former judgment. Are we to affirm the former judgment? If the jurisdiction of the British Courts of India has ceased, has not the jurisdiction of the Queen by way of appeal from these Courts also ceased? Has the Queen in Council

jurisdiction by way of appeal with regard to foreign territory?
Are we to affirm the judgment of the Zillah Court?

1876

Sir William Harcourt —Your Lordships may give the judgment which the Court ought, in your opinion, to have given.

DAVODAR
GORDHAN
v.
DEORAM
KANJI.

Sir James Colvile.—The cession was on the 29th January 1866. The last judgment prior to that date was pronounced by the Zillah Judge on the 18th January 1866. Would not the result of holding that there is no jurisdiction, be to stay all subsequent proceedings, and to let the party, in whose favour that judgment was passed, get the benefit of it in the Bhaunagar Court if they can give effect to it?

Sir Barnes Peacock.—After the cession, any other judgment given by a British Court would be void. Are we to confirm the judgment of the 18th January 1866, which was reversed on remand? Are we to admit that to be a just judgment on the merits?

Mr. Forsyth.—That would be monstrous!

Sir William Harcourt.—The respondents must take what remedy they can get in Bhaunagar. From the period of the cession we have nothing more to do with Bhaunagar, any more than we had with Minorca after we ceded it to Spain, unless the Political Agent can be induced to interfere.

Sir Barnes Peacock.—There is another point which should be noticed. The plaintiff sued to redeem a mortgage. The defendant set up a sale to him. The Munsif held that the transaction was one of mortgage, and not of sale. That judgment was reversed by the Zillah Judge; but the case was remanded by the High Court, and on remand the Zillah Judge held, with the Munsif, that the transaction was one of mortgage, and he affirmed the judgment of the Munsif, that on payment of the mortgage money the plaintiff might have the land back. Now the defendant was within the jurisdiction of the Munsif at the time the suit was commenced. If he had been within the jurisdiction of the High Court of Chancery in this country, notwithstanding the cession of the territory, even if passed her sovereignty, the High Court of Chancery would have had jurisdiction in the case.

The Lord Chancellor.—If the land were under its jurisdiction.

1876
 DĀMODAR
 GORDHAN
 v.
 DEORĀM
 KĀNJI.

Sir Barnes Peacock.—Though the land were in foreign territory. See the case in 1 Salkeld, page 401, and see *Ramkissen v. Barker*.

The Lord Chancellor.—You could not file a bill in Chancery for foreclosure of a mortgage in France, unless one person, against whom you went, happened to be within the jurisdiction at the time.

Sir William Harcourt.—The High Court advert to the point now taken. They say “English cases have been cited in support of the contention that a suit can be carried on within British jurisdiction as regards land in foreign territory, but none of these cases goes the length of showing that parties out of the jurisdiction can litigate in a British Court to recover land situated out of British territory.” This, I take it, would dispose of the cases referred to by Sir Barnes Peacock.

The Lord Chancellor.—There would be no means of enforcing the decree.

Sir William Harcourt.—Which is the foundation of jurisdiction.

Sir Barnes Peacock.—If the defendant refused to give up the land on the payment of the mortgage money, the Munsif might compel him by arrest.

Their Lordships at the conclusion of the argument took time to consider their decision. Subsequently in a letter from the Clerk of the Council, dated the 3rd December 1875, it was intimated that, in the opinion of their Lordships, the High Court of Bombay was mistaken in holding that there was a want of power in the Crown to cede territory in full sovereignty to Native states and rulers; but that as doubts had suggested themselves to the minds of their Lordships as to the nature of the particular transfer to which the appeal related, their Lordships were willing to hear further argument as to whether the cession to the Thakore of Bhaunagar was in fact a cession of territory in full sovereignty by the Government of India.

The case was accordingly argued on this issue on the 16th February 1866, Sir William Harcourt, Q.C., and Mr. FitzJames Stephen, Q.C., again appearing for the appellant, and Mr. Forsyth, Q.C., and Mr. J. D. Bell for the respondent.

Their Lordships' judgment was delivered as follows on the 28th

LORD SELBORNE:—In this suit, which was instituted in the British Court of Gogo for the recovery or redemption of certain land situate in the village of Gangli, on the footing of mortgage, a decree for the plaintiff (whose representatives are the respondents here) was made by the Munsif of Gogo, but was reversed on appeal by the Assistant Judge of Ahmedabad. On a special appeal by the plaintiff to the High Court of Bombay the case was remanded to the Court of Ahmedabad for retrial.

1876

DAVODAR
GORDHAN
v.
DORAM
KANJI.

So far there was no question of the jurisdiction of these different Courts over the land in controversy, as territorially situate within their proper limits, and over the parties to the suit as resident within the same limits. But in 1866, after the remand by the High Court, the jurisdiction of all these Courts is alleged by the appellant to have ceased by reason of the cession by the British Government of certain territory, within which Gangli was included, to a Native potentate, the Thakore of Bhaunagar. A notification that the territory so alleged to have been ceded was removed, from and after the 1st of February in that year, from the jurisdiction of the Revenue, Civil and Criminal Courts of the Bombay Presidency, appeared in the *Bombay Government Gazette* of the 29th January 1866. The District Judge of Ahmedabad proceeded, nevertheless, to re-hear the appeal, and, on such re-hearing, he restored the original judgment of the Munsif of Gogo in favour of the plaintiff. Thereupon the defendant brought another special appeal to the High Court of Bombay, alleging the notification in the Gazette of the 29th January 1866 as proof that the re-hearing had been *coram non judice*; but the High Court, on the 2nd December 1870, rejected this special appeal, holding that notification to be insufficient to show that the jurisdiction of the Court of Ahmedabad had ceased before the re-hearing. On a petition, however, by the defendant for a review of that order, accompanied by some further documentary evidence, the High Court appears to have considered (Record, p. 191) that a transfer of lands from British territory to the jurisdiction of a Native prince, by the authority of the Secretary of State for India, might have been authorized by the Statute 21 and 22 Vic., Cap. 106, Sec. 3, and a review of the order of the 2nd December 1870 was, therefore, directed. On the review the Judges of the High Court held that it was beyond

1876
 DĀMODAR
 GORDHAN
 v.
 DEORĀM
 KĀNJI

the power of the British Crown, without the concurrence of the Imperial Parliament, to make any cession of territory within the jurisdiction of any of the British Courts in India in time of peace, to a foreign power: and on that ground they made the order of the 24th March 1873, now under appeal, confirming their former order of the 2nd December 1870. The question, whether the law thus laid down by the High Court of Bombay is correct, was fully and ably argued at this Bar in July last; and their Lordships would have been prepared to express the opinion which they might have formed upon it, if, in the result of the case, it had become necessary to do so. But having arrived at the conclusion that the present appeal ought to fail, without reference to that question, they think it sufficient to state that they entertain such grave doubts (to say no more) of the soundness of the general and abstract doctrine laid down by the High Court of Bombay as to be unable to advise Her Majesty to rest her decision on that ground.

Before, however, the judgment, rejecting the special appeal to the High Court of Bombay, can be reversed, their Lordships must be satisfied that there was, in this case, an actual cession of territory, which had the effect, before the re-hearing by the District Judge of Ahmedabad, of depriving Gangli of the character of British territory, and its inhabitants of the status and rights of British subjects. That question, considered as one of fact in this particular case, apart from the general constitutional question as to the power of the Crown to make a cession in any case, does not appear to have been so fully considered by the High Court of Bombay as their Lordships think it deserved to be. It has now (on the 17th of February last) been the subject of a separate argument at this Bar.

The facts, material to the determination of this question, may be thus stated.

There are, in the Province of Kattywad, one or more talooks of large extent and value, belonging to the Thakore of Bhavnagar, which (whether that province ought, or ought not, to be regarded as a part of Her Majesty's dominions) have never been brought under the ordinary administration of the British Gov-

large talooks (the town and port of Bhaunagar, and many other villages and places, including Gangli), forming part of the districts of Dhundooka and Gogo, &c., which, having previously been part of Kattywad, were ceded by the Peishwa to the British Government in 1802, by the Treaty of Bassein. The territory so ceded was left, till 1815, under Native administration; but in that year it was brought under the ordinary jurisdiction of the British Courts of the Bombay Presidency, and so remained until those proceedings in 1866, the effect of which is now in question. As to these latter estates, the Thakore, and all his dependants residing thereon, were (beyond controversy) subject to British law and jurisdiction.

1876
D (MODAR
GORDHAN
v
DEORAM
KANJI.

Before 1802 the whole Province of Kattywad was divided between the Peishwa and the Gaikwar, who claimed over it sovereign rights, chiefly consisting in the exaction of tribute. A small number of estates in the province were held rent-free; but for the greater part the chieftains paid tribute, of the same character (so far as their Lordships can judge) as the land-revenue which is paid to the Government in British India; and Mr. Aitchison, in a work of authority, referred to on both sides at the Bar ("Treaties," Vol. VI, p. 366), states that the sovereignty of the country was understood by the chiefs to reside in the power to which this tribute was paid. The rest of the rights of the Peishwa, in those parts of Kattywad which had not been transferred to the British Government by the Treaty of Bassein, were ceded to Great Britain in 1817.

With respect to the Gaikwar, (leaving out of consideration one or more talooks of which that prince is at the present day the direct proprietor,) it appears that in 1807 a settlement was made between the Gaikwar and chiefs tributary to him, through the intervention, and under the guarantee, of the British Government; engagements being then taken for the payment of a fixed revenue by those chiefs whose estates were not held rent-free. The amount of tribute then fixed for the Kattywad estates of the Thakore of Bhaunagar was 74,000 rupees; and, as it was thought expedient to consolidate the whole of the claims over all the Thakore's estates, an agreement was made, with his consent, for the transfer of the revenue payable by him to the Gaikwar for

1876 his Kattywad estates to the British Government, as part of the consideration for certain arrangements, which were at the same time made for the support of a contingent force. In 1820, by further agreement, the Gaikwar engaged to send no troops into Kattywad and to make no demands upon the province except through the British Government. Since that date the supreme authority in Kattywad, (as far as it had been previously vested in the Peishwa, or in the Gaikwar,) has been exercised solely by the British Government. The tribute payable by the different chiefs has been collected by the British authorities; the Gaikwar receiving from them the share of it to which he is entitled according to the existing agreements. The tribute payable in 1871 by the Thakore of Bhaunagar, (in respect of the aggregate of his Kattywad estates included in the alleged cession of 1866,) is stated in the "Kattywad Local Calendar and Directory" of that year, (a book referred to during the last argument as containing correct information on public matters relating to the province,) as amounting in the whole to 1,54,917 rupees per annum; of which 1,28,060 rupees were collected in right of, and retained by, the British Government; 3,999 rupees were collected in right of, and paid over to, the Gaikwar; and the sum of 22,858 rupees was a customary sub-tribute, paid, under the name of "Zortullubee," to the Nawab of Junághar, one of the chiefs of the province, who appears formerly to have established some kind of superiority over the rest.

Their Lordships have now to refer to the judicial administration of Kattywad. Down to 1831 this appears to have been left, without any regular control, in the hands of the chiefs. But in that year, (a "Political Agency" having been established at Rájkot in 1820,) the British Government constituted a Criminal Court of Justice in Kattywad, under the presidency of the Political Agent, with three or four chiefs as assessors, for the trial of capital crimes in the estates of chiefs who were too weak to punish such offences, and of crimes committed by petty chiefs upon one another, or otherwise than in the exercise of their recognized authority over their own dependents. Until 1853 every sentence passed by this Court was submitted to the Bombay Government for their approval. (Aitchison, Vol. VI, p. 367.) In

province was then divided into four districts (the eastern district including all the talooks belonging to the Thakore of Bhaunagar), in each of which were placed officers, called "Political Assistants," with other British Magistrates under them, all under the control of the Political Agent. The entire number of Kattywad States under separate chiefs (large and small) is 188; of whom 96 pay tribute to or in right of the British Government only; 70 to or in right of the Gaikwar only; and nine (of whom the Thakore of Bhaunagar is one) to or in right of both Governments ("Kattywad Directory," pp. 54-56). These chiefs were, by the arrangements made in 1862, distributed into seven different classes. To the first class (consisting of four or five, of whom the Thakore of Bhaunagar is one), unlimited criminal and civil jurisdiction, with the exception of criminal jurisdiction in certain cases over "British subjects," (however that expression ought to be interpreted), was allowed. The jurisdiction of the second class (either originally, or by the effect of a Circular Order afterwards issued, No. 14 of 1866) was substantially the same. The jurisdiction of the four next classes was restricted, in criminal matters, to limited powers of fine and imprisonment, and, in civil matters, to the cognizance of suits of limited amount: the greatest powers (those of the chiefs of the third class) being to imprison for seven years, to impose fines of 10,000 rupees, and to decide civil suits of 20,000 rupees' value; while the sixth class could only imprison for three months, impose fines of 200 rupees, and decide civil suits of 500 rupees' value. The seventh, or lowest class of all, was entirely deprived of all civil jurisdiction; but, in criminal cases, might imprison for not more than fifteen days, and impose fines not exceeding 25 rupees. All other jurisdiction, both civil and criminal, throughout the province, beyond the limits of that allowed to the chiefs, was reserved to the British Officers and Magistrates, under the authority of the Political Agent; and, in 1871, there was an establishment of thirty-one such Officers and Magistrates in the whole. ("Directory," pp. 520-527.)

In 1863 two elaborate Codes of Regulations (based upon the Indian and other Codes) were promulgated, with the sanction of the Indian Government, for the guidance of the British Judicial Officers and Magistrates in Kattywad. ("Directory," pp. 176,

1876
DANODAB
GORDHAN
v.
DEORAM
KANJI.

1876 253.) These Codes established, both in name and in substance,
 DĀMODAR regular and fully-organized Courts of Justice, with powers to
 GORDHAN execute warrants and issue commissions throughout the province,
 " and to take security from suspected persons in the name of the
 DEORĀM Queen. (Articles 39, 55, 154 of the Criminal, and Article 104
 KANJI. of the Civil, Code) It may be added that, on the face of these
 Codes (especially by Article 10 of the Civil Code, which pointedly
 distinguishes the chiefs of Kattywad from "Sovereign Powers"
 and "Independent Chiefs"), and by several later Circular Letters
 of the Political Agents (No. 11 of 1866, No. 2 of 1867, No. 11 of
 1869, and that of the 7th May 1868,) the whole jurisdiction exer-
 cised by the chiefs of all the seven classes is treated as conferred
 upon them by the British Government.

These being the circumstances which their Lordships think material to a correct understanding of the arrangements between the Indian Government and the Thakore of Bhaunagar, and of the steps taken to carry them into effect, it now becomes necessary to advert to those arrangements. It appears that the difference between the position of the Thakore in his Kattywad estates, in which he continued to exercise his ancient powers, paying a fixed revenue, and his position in his British estates (including his two largest towns and his place of residence), in which, since 1815, he had been subject to ordinary British laws, was (in the language of Mr. Aitchison, Vol. VI, p. 374), "very irritating to him." With a view (among other things) to remove or diminish this source of discontent, an agreement was concluded between him and the Indian Government in 1860, which is printed at pp. 416-420 of the same volume of Mr. Aitchison's work.

It is entitled "Settlement, framed according to Resolutions of the Bombay Government, Nos. 3826 and 3829, dated 23rd October, 1860:"—a title which has the aspect of an agreement as to rent and other terms of tenure, rather than that of a treaty between the head of a sovereign state and a foreign or independent power. When the particular terms of this agreement are examined, they confirm that impression.

By the 1st and 8th Articles the Thakore of Bhaunagar and the British Government reciprocally agreed to cancel, from and

after the 1st May 1861, "the lease of the villages of the Thakore's talooks in the districts of Dhundooka, Ranpur, and Gogo, which was executed in A.D. 1848," and, "instead thereof, the Thakore agreed to pay, for the whole of the villages enumerated in that lease, a fixed jumma of 52,000 rupees yearly for ever," which sum "shall not be in any way affected by the result of any action or other process brought by any party against the Thakore's right of possession, in any part of the said talooks; nor shall the said estates (excepting Bhaunagar, with Wudwa, Sehore, and the ten villages thereof, about to be attached to Kattywad) be exempted on account of this payment from any general taxation, not coming under the head of land-tax or rental which Government may impose on their districts under the Regulations."

1876
 ———
 DAMODAR
 GORDHAN
 D.
 DEORAM
 KANJI.

It appears, therefore, that the talooks in Gogo, including Gangli, which were "about to be attached to Kattywad," had been included in the lease of 1848, which was then to be canceled; and that, although the Government did not reserve, as to those particular talooks, the same right of "general taxation" which they expressly reserved as to the residue of the Thakore's British estates, which were intended to continue subject to the Bombay Regulations, still those talooks were included in the estates, in respect of which a fixed jumma of 52,000 rupees was to be paid in perpetuity by the Thakore.

By the 2nd Article the Thakore agreed, (certain questions of account between himself and the British Government being thereby adjusted,) "to pay up 'his Kattywad tribute,' (*i.e.*, the jumma for his Kattywad property,) which had been fixed in perpetuity in 1807, yearly in full, according to settlement."

By the 3rd and 9th Articles it was reciprocally agreed that the port dues and customs of the port of Bhaunagar should continue to be collected at British rates, and by the British Government; but that, when collected, the whole net produce of the port dues, and three-fifths of the net produce of the customs, (as "the share of the Thakore,") should be paid over to the Thakore by the Government, who were to retain, as "the share of Government," the other two-fifths of those customs.

1876
DĀMODAR
GORDHAN
v.
DEORĀM
KĀNJI.

The town and port of Bhaunagar were part of the territory to which the 7th Article, (that directly bearing upon the present question,) relates. That article is in these words :—"Upon the above conditions Her Majesty's Government agreed as follows : Government concede, as a favour, and not as a right, the transfer of Bhaunagar itself, with Wudwa, Sehore, and ten subordinate villages, from the district of Gogo, subject to the Regulations to the Kattywad Political Agency."

This is not the language of cession. It is *prima facie* nothing more than an engagement for the transfer of the places mentioned (including Gangli), which were then, beyond question, British territory, from a Regulation Province to an extraordinary jurisdiction. The other articles are consistent with this view.

After the conclusion of this agreement in 1860, a delay of some years followed before anything was done with a view to give effect to the provisions of the 7th Article; "owing" (as Mr. Aitchison states, Vol. VI, p. 374) "to some doubts as to the precise status of Kattywad with respect to British laws." In 1865, however, the Thakore pressed for the completion of the arrangement. In the letter from the Secretary to the Government of India of the 31st of May 1865, to the Acting Secretary of the Government of Bombay (printed at page 181 of the Record), the measure is described as "the contemplated transfer of the town of Bhaunagar, of the District of Sehore, and of the villages in Dhundooka and Gogo, to the supervision, laws, and Regulations of the Kattywad Political Agency." By that letter the Governor-General in Council authorized "the contemplated arrangement" being at once carried into effect; with the reservation, however, (for which the Government of Bombay were directed carefully to provide), that, "in the event of gross misconduct on the part of the Thakore" (of which the Government of Bombay were to be the judges), "these territories should revert." A reason was added for holding that "the projected transfer would have been legalized" by the agreement of 1860, viz. that "Her Majesty's Secretary of State for India had decided that Kattywad was not British territory."

evidence is found in the papers before them), and if that opinion could be proved to be well-founded, it would still not have the effect of converting a transfer of certain British territories from ordinary British jurisdiction "to the supervision, laws, and regulations of the Kattywad Political Agency," into a cession of British territory to a Native state. Such a cession would be a transaction too important in its consequences, both to Great Britain and to subjects of the British Crown, to be established by any uncertain inference from equivocal acts.

1876

DAMODAR
GORDHAN
v.
DEORAM
KANJI.

Their Lordships assume, (though the precise language used does not seem to be quite apt for that purpose,) that what was intended was to confer upon the Thakore of Bhaunagar, within the "transferred" districts, as large a criminal and civil jurisdiction as that which he exercised in his estates situate within the proper limits of the Kattywad Political Agency, subject only to the same supervision and control of the Kattywad Political Agent to which he was subject in respect of those estates.

But such a grant of jurisdiction, (if the Government of India or the Crown, without a legislative Act, had been able to grant it,) would not have deprived the crown of its territorial rights over the "transferred" districts, or the persons resident therein of their rights as British subjects. Whatever may have been the opinion of the Indian Government as to the effect of what was done, (concerning which their Lordships will only observe that the documents of 1870 and 1871, printed at pp. 184 and 185 of the Record, take it for granted that a cession of territory to a Native state had been made, which is the point to be determined,) their Lordships' judgment must be founded, not on mere opinions, but on facts; and they find, in point of fact, that there was no cession of territory in this case, unless it can be deemed to have been made by the agreement of 1860, or by the notification in the *Bombay Government Gazette* of the 29th January 1866, (issued, no doubt, in obedience to the directions of the Indian Government, contained in the letter of the 31st May 1865), which merely declared that, "in accordance with the Convention, &c.," (i.e., with the agreement of 1860,) the villages in question were, "from and after the 1st of February 1866, removed from the jurisdiction of the Revenue, Civil, and Criminal Courts of the Bombay

1876
 — DĀMODAR —
 GORDHAN
 " "
 DEONĀM
 KANJI

Presidency, and transferred to the supervision of the Political Agency in Kattywad, on the same conditions as to jurisdiction as the villages of the Talook of the Thakore of Bhaunagar heretofore in that province." (Record, p. 176.)

Their Lordships agree in the reasons given by the Judges of the High Court of Bombay, on the 2nd December 1870, for holding this notification insufficient for the purpose intended; and they are unable to find, in any of the other documents afterwards submitted to that Court on the application for a review, any good reason for the subsequent departure of the High Court from that opinion, so far as to admit a review. The second notification of the 4th January 1873, which appeared in the *Indian Gazette* after the review had been ordered, also left the case substantially where it stood before. That notification was merely to the effect that the villages, mentioned in the schedule, "were, on the 1st February 1863, ceded to the State of Bhaunagar." The nature and effect of the act, so described as a "cession to the State of Bhaunagar," remains (as it was before) a proper subject for judicial inquiry. What was attempted was, in their Lordships' judgment, neither more or less than a re-arrangement of jurisdictions within British territory, by the exclusion of a certain district from the Regulations and Codes in force in the Bombay Presidency, and from the jurisdiction of all the High Courts, with a view to the establishment therein of a Native jurisdiction under British supervision and control. But this could not be done without a legislative Act, which, in this case, was never passed. By the Imperial Statute, 3rd & 4th Wm. IV, Cap. 85, Section 43, a general power of legislation (with certain exceptions not material for this purpose) was given to the Governor-General in Council as to (among other things) "all Courts of Justice, whether established by Her Majesty's charters or otherwise, and the jurisdiction thereof." This power is, in substance, continued by 24 and 25 Vic., Cap. 67, Section 22, though the particular clause of the former statute is thereby repealed. By the 24th and 25th Vic., Cap. 104, Section 9, the High Courts of the several Presidencies were established with such jurisdiction as Her Majesty should, by her Letters Patent, confer upon them;

might be otherwise directed, and subject to the legislative powers in relation to the matters aforesaid of the Governor-General in Council," all jurisdiction, power, and authority previously vested in any of the East India Company's Courts within the same Presidency, which were abolished by that Act. It is unnecessary to refer to later enactments, which only modified these provisions in a way not affecting the present case. The jurisdiction, therefore, of the Courts of the Bombay Presidency over Gangli rested, in 1866, upon British statutes, and could not be taken away or altered (as long as Gangli remained British territory), so as to substitute for it any Native or other extraordinary jurisdiction, except by legislation, in the manner contemplated by these statutes.

Upon two subordinate points in this case their Lordships think it right to add that they agree with the view taken by the High Court of Bombay.

Nothing, in their judgment, turns in this case upon the Indian Evidence Act of 1872, section 113. The Governor-General in Council being precluded by the Act 24 and 25 Vic., Cap. 67, Section 22, from legislating directly as to the sovereignty or dominion of the Crown over any part of its territories in India, or as to the allegiance of British subjects, could not, by any legislative Act, purporting to make a notification in a *Government Gazette* conclusive evidence of a cession of territory, exclude inquiry as to be the nature and lawfulness of that cession. And with respect to the competency of the Courts of the Bombay Presidency to proceed with the suits between these parties, if Gangli had, by any valid cession, ceased to be British territory, their Lordships agree with the High Court that the foundation of the jurisdiction of those Courts over the subject-matter of this suit, and the parties thereto, was territorial, and that it could no longer be exercised (whatever might be the stage or condition of the litigation at the time) after such a valid cession had been made.

Their Lordships will humbly advise Her Majesty to dismiss the appeal.

Messrs. Lawford and Waterhouse were agents for both parties
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1876.

DĀMODAR

v.
DEORAM
KĀNJI.

[ORIGINAL CRIMINAL JURISDICTION.]

1876
November 24REG. v. VITHALDAS PRANJIVANDAS AND OTHERS.
High Courts Criminal Procedure Act (X of 1875), Section 33—Constitution of jury

Act X of 1875, Section 33, contemplates that the names of the jury to be "chosen by lot" shall all be drawn out of one box containing the names of all persons summoned to act as jurors.

THE prisoners, who were all Hindus, were charged with attempting to pass a forged currency note. The majority of the jury, who had been selected in the mode that had been adopted since the coming into force of Act X. of 1875,⁽¹⁾ were Europeans.

Purcell for the first prisoner objected that the jury had not been drawn "by lot" as contemplated in Act X. of 1875, Section 33; a mode of drawing which insured the majority of the jury being Europeans could not be called a drawing by lot. All the names ought to be drawn from one box. The question arose incidentally in the case of *Reg. v Lalubhai*,⁽²⁾ but in disposing of that case the learned Judges expressed no decided opinion on the present point.

[BAYLEY, J., referred to the concluding paragraph of Section 49, and to the Crown Office Rule made by the Supreme Court in 1842 for "Ballotting Petty Jury" (No. 592) at page 155 of the Rules and Orders of the Supreme Court of Judicature at Bombay.]

Inmerarity for the third prisoner took the same objection. Section 33 of the High Courts Criminal Procedure Act contemplates the drawing of all the names of the jury from one box. In that case they might, no doubt, be all Europeans, but again there might not be a single European on the jury. But, if the present mode of drawing be followed, there must always be a majority of Europeans on the jury. The present mode is, therefore, opposed to the provisions of the Act.

Farran for the Crown :—According to the present mode the jury are practically drawn by lot, though in certain proportions. It is a chance what particular name is drawn, and that is all that is contemplated in Section 33 of the Act. The nationality of the majority of the jury, no doubt, is not a matter of chance according

(1) See *Reg. v. Lalubhai*, L.L.R., 1 Bom. 232. (2) L.L.R., 1 Bom., 232.

to the present mode of drawing, but the section does not contemplate that it should be. There is nothing in Act X. of 1875 which gives Native prisoners the right to demand a majority of Natives on the jury. That was ruled in *Reg. v. Lalubhai*, ⁽¹⁾ and the learned Judges, who decided that case, also expressed an opinion in favour of the present mode of drawing ⁽²⁾ The present mode is the same as that followed under the old Crown Rules. If the present mode be incorrect, all the criminal cases which have been tried during the last thirty years have been erroneously conducted-

1876
REG.
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VITHALDAS
PRANJIVAN-
DAS AND
OTHERS.

BAYLEY, J.—The objection having now been taken, must, after the short consideration I have been able to give it, I think, be allowed. Section 33 of the High Courts Criminal Procedure Act (X. of 1875) enacts that "The jury shall consist of nine persons, who shall be chosen by lot from the persons summoned to act as jurors."

Section 39 enacts that, save as therein provided, the High Courts shall retain all their present powers respecting the summoning, empannelling, qualification, challenging, and service of jurors, and shall have power to make such rules on these subjects (consistent with the provisions of the Act) as seem to them to be proper; and that "all rules relating to jurors now in force in the same High Courts shall (so far as they are consistent with this Act) remain in force until repealed or altered by new rules made under this Section."

The rule as to balloting for petty juries, which was made in 1842, is to be found at p. 155 of the Collection of Rules and Orders of the Supreme Court of Bombay printed for Government in 1852,—a collection which, as appears from the preface, was compiled by Mr. McKenzie, the Clerk of the then Chief Justice, Sir Erskine Perry, "under his Lordship's guidance, and with the assistance of the officers of the Court." That rule and the others contained in the collection, relating to juries, were framed under the powers given to the Supreme Court by the Statute 7 Geo. IV., C. 37, "An Act to regulate the appointment of Juries in the East Indies," Section 2.

(1) I. L. R., 1 Bom. 232.

(2) The report of *Reg v. Lalubhai* had not been published at the time of this trial.

1876. The rule as to balloting for petty juries refers to the one next
 REG. preceding it, as to the balloting for grand juries, and I will,
 v. therefore, read both of them :—
 VITHALDAS
 PRANJIVAN-
 DAS AND
 OTHERS.

“XI.—BALLOTING GRAND JURY.

521.—The name of each man who shall be summoned for the Grand Jury, with the place of his abode and addition, shall be written on a distinct piece of paper or card, such pieces of paper or card being all as nearly as may be of equal size, and shall be delivered by the Under-Sheriff unto the Clerk of the Crown, and shall by him be put together in a box, and he shall from the said box in open Court draw the said pieces of paper, or card, indiscriminately one after the other, and the names of the first twenty-three that shall be drawn out and appear, except such as shall be excused by the Court for good and sufficient reason, shall act and be the Grand Jury for that sessions.”

“XII.—BALLOTING PETTY JURY.

522.—The name of each man who shall be summoned for the Petty Jury, with his place of abode and addition, shall be written and delivered to the Clerk of the Crown as aforesaid and placed in a box, and the said names shall be drawn as aforesaid, and the twelve persons whose names shall be first drawn, of whom six shall be British subjects, that shall appear and not be challenged or set aside or excused, shall form the Petty Jury on each trial: provided also, that on the trial of any person who professes the Christian religion the twelve persons professing that religion whose names shall be first drawn that shall appear and shall not be challenged or set aside or excused shall form the Petty Jury on such trial.”

Since I first practised in the late Supreme Court (Jan. 1861), the practice at the Criminal Sessions, until the coming into operation of Act X. of 1875, was to have separate ballot boxes, or rather two long boxes, the ones now in Court, each containing three compartments, and marked on the outside ‘Europeans,’ ‘Indo-Britons,’ ‘Portuguese,’ ‘Parsees,’ ‘Hindoos,’ ‘Mahomedans.’ The first six names were drawn from the European compartment, then three from the compartments marked Indo-Britons and Portuguese, and

of nine were established in 1875, the practice has been to draw the first five names out of the European compartment, and the four others from the other compartments.

I am not aware that the rule I have quoted has ever been varied or abolished by any subsequent rule, though the practice seems scarcely to have been in strict accordance with it. Section 49 of Act X. of 1875, however, says that rules relating to juries now in force in the High Courts shall (so far as they are consistent with the Act) remain in force until repealed or altered by new rules made under that section. That section preserves the old rules, but it does not apparently preserve any practice which may have sprung up inconsistent with them.

It is, of course, unnecessary to give any opinion as to the validity of the mode of balloting up to the present time.

Looking, therefore, at the two rules of 1842 which I have cited, and at section 33 of Act X. 1875, it appears to me that the nine persons who are to be chosen by lot to form the jury ought to be selected from the entire number of persons summoned to act as jurors, and that this selection, which is to be 'by lot,' ought to be made from one box and not from six boxes. Such a mode of selection is more in accordance with the provisions of the new Act and the rule of 1842 than the mode hitherto adopted, and I accordingly direct that the names of the persons of all nationalities be put into one box, and that nine names be drawn out indiscriminately to form a jury for the trial of the present case. (1)

NOTE FURNISHED BY MR. JUSTICE BAYLEY TO THE REPORTER.

In the Charter, dated 26th March 1774, of the Supreme Court at Fort William, Clause 19 (2 Morley's Digest, page 570), and in the Charter, dated 26th December 1800, of the Supreme Court at Madras, Clause 33 (2 Morley's Digest, page 615), the petty juries to be summoned are to be "other good and sufficient men being subjects of Great Britain of us, our heirs or successors, and resident in the said town of Calcutta," and "other good and sufficient men, being persons heretofore described and distinguished as British subjects of us, our heirs and successors, and resident in Fort St. George or the said town of Madras or the limits thereof, or the factories subordinate thereto."

In the Charter, dated 8th December 1823, establishing the Supreme Court of Bombay, Clause 43 (2 Morley's Digest, page 667), the petty juries to be summoned are to be "other good and sufficient men, being persons so heretofore described and distinguished as British subjects, of us, our heirs and successors, and resident in the said town or island of Bombay or the limits thereof, or the factories subordinate thereto."

(1) The mode of selection, thus adopted, was followed at the trial of all the subsequent cases at the same sessions.

1876.

REG.

V.
VITHALDAS
PRANJIVAN
DAS AND
OTHERS.

1876. The provisions of the Statute, 7 Geo. IV., C. 37, under which the jury rules of 1842 were made by the late Supreme Court, are important.

REG. It recites that by the 13th Geo. III. C. 63, it was among other things
 v. enacted that all offences and misdemeanors which should be laid, tried,
 VITH LDAS and inquired of in the Supreme Court at Fort William should be tried by a
 PRANJIVAN- jury of British subjects, resident in the town of Calcutta, and not other-
 DAS AND wise; and that it was expedient that the right and duty of serving on
 OTHERS. juries within the limits of the local jurisdiction of the several Supreme Courts at Calcutta, Madras, and Bombay should be further extended. It was enacted (Section 1) "That all good and sufficient persons, resident within the limits of the several towns of Calcutta, Madras, and Bombay, and not being the subjects of any Foreign State, shall according to such rules and subject to such qualifications as shall be fixed in manner hereinafter mentioned be deemed capable of serving as Jurors on Grand or Petty Juries and upon all other Inquests, and shall be liable to be summoned accordingly anything in the said Act or in any other Act, Charter, or usage to the contrary notwithstanding."

By Section 2 it was enacted "That the respective Courts of Judicature at Calcutta, Madras, and Bombay shall have power from time to time to make and establish such rule with respect to the qualification, appointment, form of summoning, challenging and service of such Jurors, and such other regulations relating thereto as they may respectively deem expedient and proper: provided always that copies of all such Rules and Regulations as shall be so made and established by such Courts of Judicature shall be certified under the hands and seals of the Judges of such Courts, to the President of the Board of Commissioners for the affairs of India, to be laid before His Majesty for His Royal approbation, correction, or refusal; and such Rules and Regulations shall be observed until the same shall be repealed or varied, and in the last case with such variation as shall be made therein."

By Section 3 (and last) it was enacted "That the Grand Juries in all cases and all juries for the trial of persons professing the Christian religion shall consist wholly of persons professing the Christian religion."

The last cited section (3) was from and after the 1st July 1832 repealed by the Statute 2 and 3 William IV., C. 117, Section 2.

Mr. Justice Bayley has inquired, but has been unable to discover that any rules have been made since 1842, altering the mode of balloting for petty juries prescribed in the Rule (No. XII. 522) quoted in the Report. He apprehends that such rule was in force when the "High Courts Criminal Procedure Act, 1875," came into operation on the 1st May 1875.

In the rules framed by the late Supreme Court of Bombay in 1838, under the 7th Geo. IV., C. 37, as to the qualification and exemption of jurors Nos. 598, 599, page 150 of the Collection of Rules and Orders of the

to serve on Juries. But persons who do not understand the English language shall not serve on Juries nor be inserted in the list."

The rule made in 1842, as to the precept to the Sheriff to summon jurors (No. 518, page 154 of the Collection of Rules and Orders of the Supreme Court) directs that "The Clerk of the Crown shall, fourteen days at least before each Sessions of Oyer and Terminer, issue his precept to the Sheriff, commanding him to summon thirty of the principal inhabitants, resident in the town and island of Bombay, being subjects of the King, to attend as a Grand Jury, and forty-eight good and sufficient men, being subjects of the King, resident within the island of Bombay, or the factories subordinate thereto, to serve on the Petty Jury."

And by the next succeeding rule (519) one-half of those summoned to serve as petty jurors shall be⁽¹⁾ British subjects.

1876.

REG.
v.VITHALDAS
PRANJIVAN-
DAS AND
OTHERS.

[APPELLATE CIVIL JURISDICTION.]

Civil Referred Case No. 97 of 1876.

PRANSHANKAR SHIVSHANKAR (DEFENDANT, APPELLANT) v.
GOVINDHLAL PARBHUDAS (PLAINTIFF, RESPONDENT).

Action for damages caused by a civil action—Costs.

No action is maintainable for damages occasioned by a civil action, even though brought maliciously and without reasonable and probable cause; nor will it lie to recover costs awarded by a Civil Court.

THE following case was submitted for the opinion of the High Court by Gopalrao Hari Deshmukh, Judge of the Court of Small Causes at Ahmedabad:—

"The plaintiff Pranshankar obtained a decree against one Govind Khusab in the Subordinate Judge's Court, and got two houses attached on the 20th July 1872. Govind Parbhudas, defendant in the present suit, applied to the Court under Section 246 of the Code of Civil Procedure, on the 1st August 1872, for removal of the attachment laid on the houses, alleging that they were purchased by him. The objection was allowed by the Subordinate Judge, who ordered the attachment to be removed. Whereupon the plaintiff instituted a regular suit against the defendant which was decided in favour of the latter. Against this decision the plaintiff appealed to the Assistant Judge's Court, which decided on the 26th August 1874 that the purchase-deed was fraudulent, and that the objection to the sale be disallowed. Consequently the plaintiff recovered the amount decreed, not by sale of the houses, but by cash payment of Rs. 600. The plaintiff

(1) See 1 Morley's Digest, page 89, British subject, Note 1.

1876. now seeks in this Court to recover interest at 9 per cent. per annum, from 20th July 1872 to 25th October 1875, during which period he was prevented from executing his decree by the defendant, and the amount of costs that was paid by him to the defendant, as awarded by the Subordinate Judge in the miscellaneous application for removing the attachment. The question is whether a suit for such damages can be maintained.

PRANSHANKAR SHIVSHANKAR
v
GOVINDHILAL PARSHUDAS.

“My opinion is that the claim should be maintained, as the transaction on the part of the defendant appears to be tinged with fraud, as seen from the decision of the Assistant Judge.”

The reference was considered in Court by MELVILL and NANABHAI HARIDAS, JJ., on the 28th November 1876.

No counsel or pleader was instructed on either side.

PER CURIAM :—The Court is of opinion that the suit will not lie. An action is not maintainable for damages occasioned by a civil action, even though brought maliciously, and without reasonable and probable cause (*see Addison on Wrongs*, p. 599, 31d edition); neither will a suit lie to recover costs awarded by a Civil Court, though it may lie for costs which could not be so awarded : *Chengulca Raya Mudah v. Thangatchi Ammal*.⁽¹⁾

PRIVY COUNCIL.

June 20 and 21, 1876.

PRESENT:

SIR BARNES PEACOCK.

SIR MONTAGUE E. SMITH.

SIR ROBERT P. COLLIER.

SIR HENRY S. KEATING.

ON APPEAL FROM THE HIGH COURT OF JUDICATURE AT BOMBAY.

COWASJEE NANABHOY (DEFENDANT) v. LALLBHOY VULLUBHOY AND OTHERS (PLAINTIFFS).

Contract of partnership—Right of co-partners to dissolve partnership.

A contract between a partner and his co-partners for remuneration to the former for the management of the partnership business by a commission on the sale, during his life-time, does not, in the absence of any express agreement to that effect, imply a renunciation of the right of the co-partners to dissolve the partnership if they find that it cannot be carried on, except at a loss; nor does it imply an obligation to pay the managing partner com-

pensation in case the partnership is dissolved for that reason.

1876.

Rhodes v. Forwood (L. R. 1 App. Ca., 256) referred to and approved

THIS was an appeal from a decree, dated the 11th January 1872, of the High Court of Judicature at Bombay (Equity Side), made, on further directions, in a suit which was instituted in November 1861, with the object of winding up a private partnership in which Cowasjee Nanabhoy was manager.

COWASJEE
NANABHOY
v
LALLBHOY
VULLUBHOY

The material question to be determined on the appeal was, as to whether Cowasjee Nanabhoy, now deceased, but represented for purposes of the appeal by his administrators, was entitled, on the winding up of the partnership, to compensation in respect of an engagement in the partnership articles that he should have the management of the partnership, and should be the agent and broker thereof during his life.

The Articles of the Partnership are set forth in their Lordships' judgment.

Mr. Pearson, Q. C., and *Mr. Whitehorne*, on behalf of the representatives of Cowasjee Nanabhoy, contended that, on a true construction of the Articles of Partnership, Cowasjee was entitled to compensation, his engagement not having been terminated by his own act or default, but by the act of a majority of his co-partners in winding up the partnership. They referred to the following cases :—

Inchbald v. The Western Neulgherry Plantation Company.⁽¹⁾

Mac Intyre v. Belcher.⁽²⁾

Forwood v. Rhodes.⁽³⁾

Yelland's Case.⁽⁴⁾

Ex parte Clark.⁽⁵⁾

Ex parte Logan.⁽⁶⁾

Ex parte Maclure.⁽⁷⁾

Patent Floor Cloth Company, Limited, Dean and Gilbert's Claim.⁽⁸⁾

Hartland v. General Exchange Bank.⁽⁹⁾

Burton v. Great Northern Railway Company.⁽¹⁰⁾

(1) 17 C. B. N. S. 733. (2) 14 C. B. N. S. 654.

(3) 33 Law Times Rep. N. S. 314, and L. R., 1 App. Ca., 256.

(4) L. R. 4 Eq. 350. (5) L. R. 7. Eq. 550. (6) L. R. 9 Eq. 149.

(7) L. R. 5 Ch. Ap. 737. (8) 26 Law Times Rep. N. S. 467.

(9) 14 Law Times Rep. N. S. 863. (10) 9 Exch. 507.

1876	<i>Taylor v. Caldwell</i> ⁽¹⁾
COWASJEE	<i>Pilkington v. Scott</i> ⁽²⁾
NANABHOY	<i>Hartley v. Commings</i> ⁽³⁾
v	<i>The Queen v. Welch</i> ⁽⁴⁾
LALLBHOY	<i>Whittle v. Frankland</i> ⁽⁵⁾
VULLUBHOY	<i>Pricket v. Badger</i> ⁽⁶⁾
	<i>Sterling v. Mailland</i> ⁽⁷⁾

Mr. Leith, Q.C., and *Mr. Parke*, who appeared for the respondent, were not called on.

The judgment of their Lordships was delivered by

SIR ROBERT COLLIER:—The circumstances under which this appeal arises are as follows:—

On the 10th January 1857, Cowasjee Nanabhoy entered into an agreement with a number of persons, who were to form a partnership with him for the purpose of establishing a factory for the manufacture of cotton twist. As the terms of this agreement are very peculiar, it is as well to read *in extenso* the material parts of it. The beginning of the agreement is to this effect:—"To Parsee Cowasjee Nanabhoy Dawar, written by us the undersigned, (who) do give in writing to you as follows:—You are establishing a factory for the manufacture of 'water' cotton twist. For the same there have been made 100 allotments, *i.e.*, 100 shares each; one share has been fixed at about Rs 3,000, *viz.*, three thousand. Relative to the same, we have given in writing to you this instrument, agreeably to the particulars written below. The first clause is this:—For the above-mentioned factory (ground is to be procured), and a building is to be erected, and machinery is to be sent for from Europe, and the same is to be set up here. In regard thereto, whatever business may have to be transacted, *i.e.*, the employment of persons, and whatever outlays may have to be made for the said factory, the whole management thereof, all we the undersigned shareholders having agreed, have intrusted to you. That management do you duly carry on during your life-time, and the entire authority for signing and carrying on the entire management of the said factory belongs to you, and after the decease of you, Cowasjee, the whole of the

(1) 3 Best and Smith, 826.

(2) 15 Mees and Wel, 657. (3) 5 Q. B. 247. (4) 2 E. and B. 357.

(5) 2 Best and Smith, 49. (6) 1 C. B. N. S., 296. (7) 5 Best and Smith, 840.

shareholders are to approve of such agent or trustee as the shareholders, having held general meeting, may appoint." The second clause runs thus:—"Out of the above 100 allotments, *i.e.*, shares, as many shares as we have taken we have made known below in writing, in the place of the signature of each of us, and at the time of signing this agreement, having paid you a deposit at the rate of Rs. 500, viz., 500 for each one share, a receipt bearing your signature was obtained." The third is in these terms:—"For the above purpose, whatever may have been expended for a building and machinery, and whatever other outlays may have been made and may hereafter be made, all those we the shareholders are duly to pay in equal portions agreeably to our shares, the calls which you make in respect of the same as there may be need, we are duly to pay within 15 days' time. If within the said time of 15 days we should not pay the amount of each call of those calls which you may make, then the share or shares subscribed by us shall become forfeited, *i.e.*, there shall not remain on the part of those who may not pay the calls, any right to the deposit to the amount of Rs. 500, viz., 500 paid per share, and the call or calls which may have been (already) paid, and the money paid for the same shall be credited to the profit account of this company: and hereafter should any shareholder of the shareholders who have signed below sell or make over his share or shares to any individual, the party or parties purchasing the same hereafter is or are also duly to act up to this agreement." The fourth runs thus:—"All we shareholders having agreed to make this agreement or settlement (*viz.*), that, in return for the trouble you have been at in getting up this factory, we have appointed you for your life the agent or broker of this factory, as to that it is to be understood as follows:—Whatever cotton may have to be purchased for this factory do you purchase, and whatever yarn may be made in this factory all that do you sell, and for whatever you may sell, on account of the factory, do you duly receive from this company the commission at the rate of Rs. 5, viz., 5 per cent. during your lifetime, but upon purchases you are not to receive anything from the company: yet on goods which you may purchase from merchants and sell, you yourself having received a percentage, also agreeably to custom, do you duly give credit for the same to this company," and so on. The fifth relates to sending for machinery

1876.

COWASJI
NANABHOY
"
LALLBHOY
VULLUBHOY.

1876. on behalf of the company, and setting up the machinery, and so forth. The 6th relates to the calling of meetings, and the remaining provisions do not for the present purpose appear to be material.

COWASJEE
NANABHOY
 v
LALLBHOY
VULLUBHOY

Cowasjee took a number of shares in the company, some of which he held up to the time of the winding up. He was undoubtedly a partner with these persons. He called up the full amount which was contemplated by this agreement, namely, Rs. 3,000 on each share, all the shares having been taken. Some time afterwards he called up another Rs. 1,000 on each share, and he also borrowed a sum of Rs. 1,50,000; he borrowed it, indeed, upon his own credit, but he charged it to the company, and he made another call of Rs. 500 per share. Upon this the shareholders became dissatisfied; meetings were called, and they came to the conclusion that the company could not be carried on profitably with the capital which had been subscribed, or which they were bound to pay, and under these circumstances they filed a bill praying, among other things, for a dissolution and winding up of the company. The order for the dissolution was made by the High Court of Bombay, and the reasons for making it are stated in the judgment of the High Court, of which it is not necessary to read more than the following passage: "Supposing the partnership to be for a definite period, or one which is not dissoluble at the will of the majority of the members, we are of opinion that a state of things has arisen which requires the Court to decree a dissolution. It is impossible for the business of the company to be carried on without making further calls on the shareholders, the debt is accumulating, and it appears that even with the capital subscribed, the business could not be carried on." An appeal was preferred against this judgment to the Queen in Council. The judgment was affirmed by the Queen upon the advice of this Board, but entirely without prejudice to the question whether or not Cowasjee was entitled to compensation. Subsequently, the High Court of Bombay decided that he was not entitled to any compensation, and from this last decision the present appeal is preferred.⁽¹⁾

This question arises upon the construction of the contract. It is to be observed, as was properly called to their Lordships' atten-

tion by the counsel for the appellants, that this is not a contract between master and servant, or between principal and agent, — at all events, not a contract pure and simple between principal and agent,—but it is a contract between a partner and his co-partners. It is further to be observed that the remuneration of Cowasjee is not to be by salary, but by a commission upon sales. The distinction between the position of a man who is to be paid by a fixed salary and that of a man who is to be paid by a commission is obvious. The man who is paid by a salary is not necessarily affected by the prosperity or adversity of the company, or even by its dissolution. He may be entitled to his fixed salary whatever may happen. But a man who agrees to be paid by a commission upon sales to a certain extent speculates on the prosperity of the company; the more the company sells the more he gets; the less it sells the less he gets; and if it sells nothing, he gets nothing. This distinction, which, indeed, is implied by the very terms used, is one which has been recognized in several cases which have come before the Courts.

The question is, whether from the whole of this agreement it is to be inferred, by necessary or reasonable implication, that all the co-partners of Cowasjee bound themselves to carry on the business at all hazards, or at whatever loss, at least during his life, or, in other words, whether they agreed to renounce their right of dissolving the company if they found that it could not be carried on except at a loss, or whether as an alternative to either of these two cases they agreed to pay him compensation. The part of the agreement which has been most pressed upon their Lordships is that contained in the 4th clause, wherein this is said (and, indeed, the same expression is used in the first clause) “You are to receive commission for what you sell on our account during your life-time” Certainly it appears to their Lordships that the effect of this provision would be to give Cowasjee a right to commission during his life-time, provided that the company was carried on and any commission was earned. It may also be contended, though it is not necessary to decide whether correctly or not, that these terms import an agreement that the partnership should be carried on at least as long as Cowasjee lived; but that would not be enough for the appellants, for they would have further

1876.

 COWASJEE
 NANABHOY
 ”
 LALLBHOY
 VULLUBHOY.

1876. to show that the partners relinquished the inherent right they would possess, notwithstanding that the partnership were established for the life of Cowasjee, or even for a definite term, of winding it up, or applying to have it wound up, in the event of its not being able to be carried on with success. This right is stated in Mr. Justice Lindley's book on Partnership, at page 243 of the last (3rd) edition, in which he says:—"In a more recent and more important case, however, the Court recognized the fact that expectation of profit is implied in every partnership, and held that if a partnership is entered into for a term of years, and the capital originally agreed to be furnished has been all spent and some of the partners are unable or unwilling to advance more money, and at the same time the concern cannot go on except at a loss, unless they do, the partnership will be dissolved by a Court of Equity. Under such circumstances as these it is unimportant whether the concern is already embarrassed or not. After everything has been done which was agreed to be done, and certain loss is the only result of going on, any partner is entitled to have the concern dissolved, although he may have agreed that the partnership should continue for some definite time, and that time has not yet expired." So, even putting it in the light most favourable for Cowasjee, that the partnership was originally intended to exist at least during the time of his life, it remains to be shown that there is any provision in this agreement from which it can be fairly inferred that his co-partners relinquished the right which they would have of applying to the Court for winding up the business if it could not be carried on at a profit, or, in event of their exercising this right, underlook to pay him compensation. In this case the company has been wound up on almost precisely the grounds which are indicated in the passage cited from Mr. Justice Lindley's book, and the order for winding up has been affirmed by this tribunal.

Their Lordships, after giving their best attention to the whole of this agreement, have come to the conclusion, that by no fair and reasonable intendment can it be inferred that the partners relinquished their right of dissolving or applying to have the company dissolved, under the circumstances mentioned, that they agreed

if they did exercise this right, to pay Cowasjee compensation.

For this reason they are of opinion that the case of Cowasjee fails.

Many cases have been called to their Lordships' attention, decided upon the terms of particular contracts, and more or less bearing upon the present; but inasmuch as the decision of this case rests upon the words of this contract, which is of a very peculiar character, their Lordships do not think it necessary or advantageous to pass those cases in review. They think it enough to say that the conclusion they have come to, that no such term as has been contended for is to be imported into this contract, appears to them in conformity with the current of decisions which have been quoted, and more especially with the last case of *Rhodes v. Forwood* decided by the House of Lords.⁽¹⁾

For these reasons their Lordships will humbly advise Her Majesty that the judgment of the High Court of Bombay be affirmed, and that this appeal be dismissed with costs.

Agents for the Appellant —Messrs. Ramsden and Austin.

Agents for the Respondents : —Messrs Chauntrell, Pollock, and Mason.

[APPELLATE CRIMINAL JURISDICTION.]

REG. v. BUDHU NANKU AND OTHERS

Evidence—Accomplice—Approver's testimony—Corroboration—Confession of co-prisoner.

A conviction based on the testimony of approvers, uncorroborated as to the identity of the accused person, cannot be sustained; and confessions of co-prisoners, implicating him, cannot be accepted as sufficient corroboration of such testimony.

THE accused persons were all convicted by W. M. P. Coghlan, Sessions Judge of Tanna, of the offence of dacoity and sentenced to transportation for life.

The convictions of the appellants, Yesu Dewlata, Rama Ambu, Pandu Ganu, Gangarám Sitarám, Sadu Rámji, Bapu Gopala, and Govind Ganu, were based on the testimony of two approvers who were not corroborated as to the identity of these appellants except by the confessions of other persons tried with them.

The appeal was heard by WESTROPP, C.J., and NANABHAI HARIDAS, J.

(1) L. R. Ap. Ca. 256.

1876

COWASJEE
NANABHOY
v.
LALLBHOY
VULLUBHOY.

1876. *Mahādev Chimndji Apte* for these appellants contended that
 REG. the conviction could not be sustained, as they had been identified
 v. only by the approvers and fellow-prisoners as having been present
 BUDHU at the commission of the crime.
 NANKU AND
 OTHERS. *Shāmrāv Fithal* for the Crown.

The Court, after confirming the convictions and sentences of certain of the appellants, disposed of the appeal of Yesu Dowlata, Rama Ambu, Pandu Ganu, Gangārām Sitarām, Sadu Rāmji, Bapu Gopala, and Govind Ganu as follows :—

As regards the others, the Court quashes the convictions and sentences on the ground that the approvers Shripatray and Rāmā are not corroborated as to the identity of these latter prisoners. The confessions of co-prisoners implicating them cannot, in our opinion, be accepted as evidence to corroborate the testimony of these approvers: See 3 Russell on crimes, 4th edition, by Greaves, pages 603, 604, and 605, *Reg. v. Malapu*⁽¹⁾ and *Reg. v. Chatur Purshotam*, decided on the 7th January 1876 by West and Nánābhái Haridās, JJ.

Note.—In the case of *Reg. v. Chatur Purshotam*, WEST and NÁNĀBHĀI HARIDĀS, JJ., went into the question of the extent of corroboration required to support the testimony of approvers at great length. On the authority of Lord Ellenborough's ruling in the trial of Colonel Despard (28 State Trials 346), the learned Judges held that "not only as to persons spoken of by an accomplice must there be corroborative evidence, but, which is more important still, as to the *corpus delicti* there must be some *prima facie* evidence pointing the same way to make the evidence of an accomplice satisfactory. As has been recognized in many cases, the man who charges another with the commission of a crime, in which he is himself implicated, requires corroboration as to the particular person, but still more as to the existence itself of any crime, or of the particular crime, from the penalty for which he is made free on the understanding that his testimony will be valuable for the prosecution." As to a conviction based on the evidence of a co-prisoner, see Proceedings, 16th October 1876, I. L. R., 1 Mad., 163.

(1) 11 Bom. H. C. Rep., 196.

[ORIGINAL CIVIL JURISDICTION.]

*Suit No. 87 of 1876.*SHEPHERD (PLAINTIFF) v. THE TRUSTEES OF THE PORT
OF BOMBAY (DEFENDANTS).1876.
June 26.*Libel—Publication—Privilege—Bombay Act I. of 1873—Practice—Costs.*

The Trustees of the Port of Bombay, who are, under the provisions of their Act of Incorporation (Bombay Act I. of 1873), bound to keep minutes of their proceedings and resolutions, and to forward copies of such minutes to the Secretary to the Local Government, passed, in relation to the hiring by them to the plaintiff of one of their steamers, the following resolution:—"Mr. Shepherd's (the plaintiff's) offer of Rs. 520 in full of all claims should be accepted, but any further transactions with him should be avoided if possible." Copies of this resolution, made by clerks in the employ of the Trustees, were recorded in two books kept in the office of the Trustees, and other copies, also made by such clerks, were forwarded to the Secretary to the Local Government and to the plaintiff himself.

Held, 1st, that the words of the resolution amounted in law to a libel.

2nd, that the act of the Trustees in transmitting a copy to the Secretary to the Local Government was a publication of the libel.

3rd, that such publication was privileged.

Quære—whether the giving of the resolution to be copied by clerks of the defendants was a publication; but, if it were,

Held that such a publication was also privileged.

Semble that had the defendants succeeded on the plea of privilege only, each party should have borne their own costs, but

Held, that as the plaint contained allegations of express malice and want of *bona fides* on the part of the Trustees in passing and publishing the libellous resolution complained of, which allegations obliged the Trustees to plead justification, on which plea also they were successful, the plaintiff must pay the costs of the suit.

THE facts of this case are sufficiently stated in the report of the motion for an injunction⁽¹⁾. The suit came on for hearing before GREEN, J., on 22nd April 1876, when the following issues were framed:—

1. Whether the resolutions of 10th and 17th February in the plaint mentioned, or either of them, amount to a libel.

2. Whether the defendants published the said resolutions, or either of them.

3. In case the Court be of opinion that the transmission of the said resolutions, to the Secretary to Government, was a publication

1876.

SHEPHERD
v.
THE TRUSTEES OF THE
PORT OF
BOMBAY.

of the said resolutions, whether, having regard to Bombay Act I. of 1873, such publication was a privileged communication.

4. Whether the said resolutions were falsely and maliciously written and published by the defendants of the plaintiff, as in the plaint alleged.

5. Whether, in case the publication of the said resolutions be deemed to have been privileged, the allegations in para. 20 of the amended plaint, or any of them, are, or is true⁽²⁾.

6. Whether the acts and conduct of the plaintiff in reference to the steam-tug "Dromedary" justified the passing and recording of the said resolutions.

7. Whether the resolutions bear the meaning ascribed to them in para. 11 of the plaint⁽²⁾.

8. Whether the plaintiff is entitled to the relief prayed in the plaint, or any part thereof.

A great deal of evidence was given on both sides, chiefly to show the state in which the "Dromedary" was when made over to the plaintiff, and when returned by him to the defendants, and the nature and cost of the repairs then necessary. The hearing, which lasted over twenty days, was concluded on 24th June 1876.

Gill and Agnew Turner for the plaintiff.

Marriott, Advocate-General (Acting), and *Pigot* for the defendants.

The argument on the points material to this report is stated at length in the following extracts from the judgment, which dispose of the points of law involved in the case:—

GREEN, J.:—The first issue raises the question whether the words used in the resolution of 10th February, and in effect reiterated in that of 17th February, amount to a libel, i.e., apart from the question whether there be foundation in fact for so using

para. 20 of the amended plaint charged that even if the defendant

such words, and apart from the question of the occasion and circumstances of publication, whether it is, in law, a libel to write and publish of another, and in particular of a contractor for the conveyance by steamers of goods and passengers, "Mr. Shepherd's offer of Rs. 520 in full of all claims should be accepted, but any further transactions with him should be avoided, if possible." I cannot doubt that it is. No doubt, when the whole turn of the phrase in question, in the present case, is considered, taking it in connection with the introductory part of the resolution (which also was published), it may not be a libel of the more serious character. But I am of opinion that such words, even taking them in connection with what precedes them, and not giving greater effect to them than the words themselves necessarily import, and whether they be regarded as a statement of fact, or as simply an expression of an opinion or advice, are in themselves calculated and likely to injure, at least, the business-character and credit of the person referred to, even though the words may not necessarily or fairly convey any imputation on his uprightness and honesty. They tend in themselves, to a greater or less extent, to deter other persons, who have, or might have, business relations with the person so referred to, from engaging in such relations or continuing to engage in them, and are in this way injurious to him in a pecuniary point of view, and to write and publish such words of a business man would, in the absence of proof that they were founded on a basis of truth, or were published on an occasion or in circumstances rebutting the presumption of law that such publication, being in itself likely to do injury, is malicious, ordinarily be a case for awarding not merely nominal damages. With the first issue is, of course, connected the seventh, viz., whether the resolutions bear the meaning ascribed to them in para. 11 of the plaint. The question, therefore, is whether the resolutions bear the meaning "that the plaintiff was an unfair dealer, and a person with whom ordinary mercantile affairs, and especially the business of the defendants, could not be safely transacted, and should, therefore, be avoided." It is for the plaintiff in a suit for libel to establish that the words in question did, in fact, mean what he alleges, and not merely that they were capable of bearing such meaning. Where suits for libel are tried by a jury under the direction of a Judge, the question whether the

1876

SHEPHERD
v.
THE TRUS-
TEES OF THE
PORT OF
BOMBAY.

1876

SHEPHERD
v
THE TRUS-
TEES OF THE
PORT OF
BOMBAY.

alleged libel is capable of bearing the meaning ascribed, may arise in this way, that if the alleged libel is, in the Judge's opinion, incapable of the meaning ascribed, he ought to tell the jury so, and not leave it to them to consider whether such meaning is, in fact, rightly ascribed or not. So the same question, whether the alleged libel was or was not capable of bearing the meaning ascribed, may have to be considered by the Court above, in the case of an application for a new trial, where the jury had found either that the meaning ascribed was, in fact, rightly ascribed, or that it was not rightly ascribed. But in any case it is for the plaintiff to establish that the alleged libel does, in fact, bear the meaning ascribed by him to it in his declaration or plaint.

It was attempted to give in evidence what certain gentlemen in Bombay had understood by the words, when they read them, as I suppose, after the words became known in the course of the present proceedings. The evidence was objected to, and I allowed the objection. It is, I think, quite clear that in the case of libel or slander couched in ordinary English words, not words of art or slang, it is not admissible to ask witnesses in what sense they understood them. In England the jury, and here, where there is no jury, the Judge, are supposed to be quite as capable of understanding, and assigning a right meaning to, words of ordinary English as any witnesses can be. In the case of *Barnett v. Allen*⁽¹⁾, which was an action of slander for calling the plaintiff a "black-leg," though a difference of opinion prevailed whether the word "blackleg" was ordinary English or slang, and, if ordinary English, what its actual meaning was, the opinion of all the Judges may be taken to be that it was for the jury to say what the true meaning of the epithet in fact was, and that if a word of ordinary English use, and not slang, evidence could not be given by witnesses what they understood by it. Now, taking the whole of the resolutions here in question together, the natural, reasonable, meaning of them is, that, in a particular transaction, there referred to, with the plaintiff, the defendants considered they had reason to be dissatisfied with, or complain of, the plaintiff's conduct.

as to what they meant by the resolutions. They have all disclaimed the suggestion of the meaning that the plaintiff was an unfair dealer, though one of them stated that he considered that the plaintiff had not dealt fairly with the defendants,—that is, had not met them in the settlement of their differences in a way which he considered the defendants, having regard to their conduct, had a right to expect. I am of opinion that the defendants, by the resolution in question, did not, in fact, intend the meaning ascribed to them in para. 11 of the plaint, and that a third person, reading the whole of the resolutions with ordinary care, would not reasonably understand by them such meaning, but that he would reasonably understand what I have said the resolutions seem to me reasonably in themselves to mean, that in a particular transaction with the plaintiff, there referred to, the defendants considered they had reason to be dissatisfied with the plaintiff (the cause of such dissatisfaction being neither expressed nor implied), and that, while accepting his offer of Rs. 520, they considered the cause of dissatisfaction (whatever it was) of sufficient gravity to induce them to resolve to avoid any further transactions with him, if possible. But, though I am of opinion that the resolutions do not bear the meaning ascribed to them in para. 11 of the plaint, yet I am of opinion that the resolutions, supposing their true meaning to be what I have ascribed to them, in themselves amount to a libel, inasmuch as, even with that meaning, their natural effect is to deter other persons from dealing with the plaintiff. On the 1st issue, therefore, I find that the resolutions referred to in that issue, in themselves, and apart from the questions whether they were justified, and whether the publication of them was privileged, amount to a libel.

My opinion on the second issue is also in favour of the plaintiff, viz., that the defendants published the said resolutions. The acts of publication relied upon at the hearing were, that copies of the resolution were transmitted to the Secretary to Government, and were recorded in the office of the Port Trust; that copies of the resolutions were sent to the plaintiff himself by the Secretary's letters of the 11th and 18th February 1876; that according to the ordinary course of business in the office of the Port Trust, of which the defendants must be taken to have had cognizance,

1876.

SHEPHERD
v.
THE TRUSTEES OF THE
PORT OF
BOMBAY.

1876.
SHEPHERD
v.
THE TRUS-
TEES OF THE
PORT OF
BOMBAY.

resolutions of the Trustees would, for purposes of copying or reference, come to the knowledge, not only of their Secretary, but also of several of their clerks, and that, in the present case, the resolutions in question are shown to have passed through the hands of three clerks, for copying or otherwise, who must, by these means, have become acquainted with their contents. It may be observed that the acts of publication alleged in the plaint are the transmission to the plaintiff himself of the two resolutions by the Secretary's letters of 11th and 18th February 1876. Now the sending of written defamatory matter to the person himself, who is affected by it, though it *may* form a ground for *criminal* proceedings, is, so far as a civil action for damages is concerned, protected, and does not constitute a cause of action. The issue, however, having been raised generally as to the fact of publication, admits of evidence being given under it, even though the acts of publication of which evidence is given may be other than those specifically alleged in the plaint

The question of publication of a libel was a good deal considered in *R. v. Burdett*⁽¹⁾. Mr. Justice Holroyd, citing 5 Co. Rep. 126 *a*, says "the mere delivering over or parting with the libel with that intent (*i.e.*, an intent to scandalize the party) is deemed a publishing. Though in common parlance that word may be confined in its meaning to making the contents known to the public, yet its meaning is not so limited in law. The making of it known to an individual only, is indisputably, in law, a publishing." And further on he says: "the mere parting with a libel with such an intent (*i.e.* to scandalize), by which the defendant loses his power of control over it, is an uttering." Now the intent to scandalize here referred to is not, it would seem, an actual explicit intention, but only the intention which the law presumes in every one who does some voluntary act, namely, that he intends to do the ordinary natural consequence of his act, which, in the case of a voluntary parting with written matter scandalous or defamatory of some other person, is that the person

scandalize" appears to me to be made in order to distinguish the parting with or uttering of a defamatory statement in an ordinary case from such cases as where one throws a libel into the sea, or gives it to a servant to put into the fire, where there would be a mere parting with, or uttering, it, but under such circumstances as would exclude any supposition of an intent to scandalize. In *Shepherd v. Whitaker*⁽¹⁾ the alleged libel was voluntarily published, and it was of such a character as to be likely of itself to injure the plaintiff, the meaning being that the plaintiff's firm had become bankrupt, and the circumstance that it was by the negligence of the servants of the defendant that, in the publication in question, the name of the plaintiff's firm had been placed under the head "first meeting under the Bankruptcy Act," instead of under the head "Dissolutions of Partnership," does not seem to have been relied upon as a defence to the allegation of publication, —in fact, the point does not seem to have been raised at all.

With reference to the present case, however, it may be a question, whether, where a corporation, which in itself can neither write or keep records of its proceedings (though it is bound to do so by its act of constitution), yet, by the hands of *employés* acting in the ordinary course of their employment, has, for the purpose of transmission or record, caused to be copied a statement defamatory of another, (such copies being the property of, and intended to be retained in the custody and control of the corporation,) can be properly said thereby to publish, part with, or utter, such statement with intent to scandalize. The point was touched upon in the case of *Lawless v. The Anglo-Egyptian Cotton and Oil Company*⁽²⁾ and in the American case there cited in the argument⁽³⁾. But the point was there considered with reference to the question, whether the preservation in a printed form, and distribution among the shareholders of a corporation, of defamatory matter was protected or not, and not whether the mere retention by a corporation, on its records, of matter of a criminary nature, is in itself a publication. The point was considered rather with reference to the question of malice, the publication itself being the distribution to shareholders at large. In the case of an individual, surely he may make as many copies as he thinks fit of

1876

SHEPHERD
v.
THE TRUSTEES OF THE
PORT OF
BOMBAY.

(1) L. R. 10 C. P. 502.

(2) L. R. 4 Q. B. 262.

1876

SHEPHERD
v.
THE TRUSTEES OF THE
PORT OF
BOMBAY.

a defamatory statement in his possession without thereby publishing it, and it was argued on the part of the defendants in the present case that the *employés* of a corporation, acting in the ordinary course of their employment, are, for this purpose, to be regarded as the corporation itself, and that so long as the defamatory statement does not pass beyond the custody and control of the *employés* of the corporation, (by whom alone a corporation can act at all,) there is no parting with or uttering of it *by the corporation*. A ruling of Mr. Justice Levinge, in *Heckford v. Garstin*⁽¹⁾, was relied on by the plaintiff's counsel on this point. There a certain firm of Gregory and Co. were secretaries of an incorporated company, called the Calcutta Ship Company, Limited. The defendant Garstin was the manager of the firm of Gregory and Co., and wrote a letter to the plaintiff containing the libel in question. This letter was copied by a clerk in the office (*ie*, the office of Gregory and Co.) into the book of copied letters by a copying machine, and the copy lay in the office. The Judge held that there was evidence of a publication by Garstin. But in this case the action was against Garstin individually, not against the Calcutta Ship Company; and, to make the ruling in point here, the action should have been against the corporation, the act of publication relied upon being the copying of the letter by a clerk in the employment of the corporation as an ordinary part of his duties. But, as I say, the action was against Garstin individually, the clerk to whom he gave the letter to be copied was not in *his* employment, and was, to all intents and purposes, so far as respects him (Garstin), a third person. However, I mention the point as one which has been raised, rather than for the purpose of deciding it. I do not find any necessity to decide it under the 2nd issue in the present case, as I am clearly of opinion that the transmission of the resolutions in question to the Secretary to Government (a fact admitted by the letter of the defendants' solicitors of 4th March) constituted a publication of them. I am, therefore, of opinion that the defendants published the said

1876.

SHEPHERD
v
THE TRUSTEES OF THE
PORT OF
BOMBAY.

in case there was, in fact, a publication of the said resolutions, such publication was what is termed "privileged," so as to exclude the presumption of malice, which the law makes from the voluntary parting with, to another, of a statement in itself defamatory. The question of the truth or falsehood, *in fact*, of the resolutions, or rather the question of the existence or non-existence of any facts forming an adequate basis for the statement, opinion, or advice, embodied in the resolutions, will form the subject of consideration under the 6th issue.

If the publication be privileged, the question, whether the resolutions are true or false in fact, or have, or have not, a basis of truth, is immaterial. If a publication be privileged by its occasion, the privilege excludes the presumption of malice, whether the matter published be true *in fact* or not, though, no doubt, the publication of defamatory matter which the publisher *knew* to be false may, as showing express or explicit malice, deprive the publication of the privileged character which it might, otherwise, have enjoyed. The question of malice, however, so far as it is not raised by the 5th issue—*i.e.*, so far as the question of express or explicit malice is not raised—may be conveniently disposed of in conjunction with the question of privilege.

The general principles of the law as to privileged publication or communication may be said to be well settled, though difficulties and diversities of opinion may have arisen, and may arise, with regard to the application of such principles to particular cases. As I have mentioned, from the fact that a person has voluntarily parted with, uttered, or published, matter in a written, printed, or pictorial form, the effect of which, when it comes to the knowledge or notice of a third person, is likely to be injurious to, or defamatory of, the person referred to in such publication, the law *presumes*, on the part of the person so publishing, an intention to injure or defame the person so referred to, or, in other words, presumes the publication to have been malicious. But where the occasion and circumstances of the publication are such as to exclude or rebut such presumption of malice, then such presumption is excluded, and, in order that

1876.

SHEPHERD
v.
THE TRUSTEES OF THE
PORT OF
BOMBAY.

sary that facts and circumstances should appear in evidence from which an inference may be drawn that the person publishing was moved by actual explicit intention to injure or defame, or by what is called express, as distinct from presumed, malice. A definition of the occasion or circumstances of publication which exclude the presumption of malice is to be found in several cases which have been cited. In *Toogood v. Shyring*⁽¹⁾, Parke, B., lays down the principles as follows :—" In general, an action lies for the malicious publication of statements which are false in fact and injurious to the character of another, and the law considers such publication as malicious, unless it is fairly made by a person in a discharge of some public or private duty, whether legal or moral, or in the conduct of his own affairs, in matters where his interest is concerned. In such cases the occasion prevents the inference of malice which the law draws from unauthorized communications, and affords a qualified defence, depending upon the absence of actual malice. If *fairly* warranted by any reasonable occasion or exigency, and honestly made, such communications are protected for the common convenience and welfare of society, and the law has not restricted the right to make them within any narrow limits." In the more recent case of *Harrison v. Bush*⁽²⁾ the Lord Chief Justice adopts the following expression of the principle :—" A communication made *bond fide* upon any subject-matter in which the party communicating has an *interest*, or in reference to which he has a *duty*, is privileged, if made to a person having a corresponding *interest* or *duty*, although it contain criminary matter which, without this privilege, would be slanderous and actionable." He says, further on, "'duty' in the proposed canon cannot be confined to legal duties, which may be enforced by indictment, action, or *mandamus*, but must include moral and social duties of imperfect obligation." In this case of *Harrison v. Bush*⁽³⁾ it may be observed that the case of *Blagg v. Stuart*⁽⁴⁾, which was relied on by the plaintiff's counsel in the present case, was not approved of in some respects, and it was pointed out that in that case it was proved that part of the allegations complained of were false to the knowledge of the

⁽¹⁾ 10 C. & F. 122; 3 C. & F. 122.

defendant in that case, and that verbal declarations of the said defendant were proved, indicating that he was actuated by malicious motives. It will be seen that, according to the principles laid down above, in order that a defamatory statement may be what is called privileged, it must be made *bonâ fide*,—that is, with an honest belief in the truth of what is stated, whether the statement in itself be true or false. If the statement be true, there is, of course, a defence to any suit for damages, quite apart from any question of privilege. If, on the other hand, the statement be made with an honest, fairly-grounded belief in its truth, though in fact it be untrue, and if it be made on an occasion or in circumstances which would of themselves make it what is called “privileged communication,” then the statement, though defamatory, and in fact false, is not malicious, and there is a good defence to the suit. Now, in the present case, the publication by the defendants of the resolutions in question, so far as it consisted in the sending a copy of them to the Local Government, does, in my opinion, come within the principle which makes a publication privileged. In so sending copies of the resolutions the defendants were acting in simple obedience to the provisions of an Act of the Legislature⁽¹⁾; they were acting in fulfilment of a duty of the strictest kind—one which, I apprehend, might have been enforced, if neglected, by *mandamus* or analogous proceeding. The publication, further, was made to the representative, in this matter, of the Local Government, whose *interest* in the proceedings of every meeting of the Port Trustees, and in having information of their concerns, is expressly recognized by the Act itself. It was contended that the Legislature, in passing the Act in question, can reasonably be supposed only to have authorized the Trustees to pass resolutions of a proper character, not scandalous, libellous, or defamatory ones, and that it cannot have been intended to impose any duty on the Trustees of transmitting to the Secretary to Government statements, though in the form of proceedings or minutes of proceedings, defamatory of the character of individuals. To this principle, so stated in general terms, there may be no difficulty in assenting, though it must also be observed that one ground of imposing on the Port Trustees the duty of sending up to Government copies of the minutes of their pro-

1876.

SHEPHERD
v.
THE TRUSTEES OF THE
PORT OF
BOMBAY.

1876.

SHEPHERD
v
THE TRUS-
TEES OF THE
PORT OF
BOMBAY.

ceedings must be supposed to be to give the Government an opportunity of watching and considering *all* their proceedings, whether good or bad, legal or illegal, and this object would not be attained unless the duty be strictly imposed of sending up copies of all their proceedings, and not merely such as may be considered legal and proper. But I cannot suppose that it was the intention of the Legislature that the Trustees of the Port of Bombay should be at liberty to pass resolutions, containing scandalous and untrue statements, concerning individuals, not "fairly warranted by any reasonable occasion or exigency," to publish such resolutions by sending them up to Government, and should be entitled to claim to shelter themselves under the defence of privilege. But, on the other hand, I am of opinion that the Legislature intended to impose on the Trustees the duty of discussing and passing resolutions upon all matters properly arising out of the exercise of the trusts and powers vested in them by the Act, or having reasonable reference to business actually transacted by them, and which they have power to transact, and the duty also of recording and transmitting to Government such resolutions as they may have so passed, and that, too, although such discussion and the resolutions passed thereon may involve the making of statements or expressing of opinions defamatory of individuals. The undue extension of the principles of privilege, when claimed by virtue of an express duty imposed by an Act of the Legislature, is, in my opinion, sufficiently guarded against by the conditions of all privilege, that the statement must be *bond fide*. Merely wanton publication of defamatory statements by a body incorporated under an Act of the Legislature, in reference to matters which it has under its Act no power to deal with, cannot be said to be *bond fide*. The privilege, in such a case as the present one, must, I think, be subject to the condition, which is a condition of all privilege, that the defamatory statement must have been made in connexion with and have naturally arisen out of, some business actually

tion, it was necessary that such transmission must be shown to have been made, not merely in fulfilment in fact of a duty, but, also, that it was made from a sense of duty, or, in other words, that the defendants must show that in the present instance they had consciously present to their minds the obligation imposed by their Act of incorporation, and that the resolutions were sent up from an actual conscious sense of such statutory obligation. Though we may reasonably suppose on the part of the Trustees an habitual sense of the obligations imposed by their Act, and a general intention to fulfil them, yet it is a very wild idea that in every individual proceeding, among the many which they do in pursuance of that Act, they have actually present to their minds the consideration, "this we are doing because it is our duty under our Act" What, in fact, took place in the present case was what might be supposed probably would take place, that the minutes of proceedings of the Trustees at their weekly meetings are copied and sent to Government as a part of the ordinary routine work of the office, and without the Trustees, as a body, or individually, giving any order in the matter, or even knowing of the fact of each separate transmission to Government. One or two of the Trustees, when asked, stated that though generally aware that the minutes of their proceedings are, in regular course, sent up to Government; yet, when passing the resolutions in question here, the consideration that they would be so sent up was not actually present to their minds. I am of opinion that in the present case it is quite enough, in order to bring the transmission to Government of these resolutions within the principle of the rule as to privilege, that such transmission was, in fact, in fulfilment of a duty imposed by the Act, and that the Trustees had an habitual sense of the duties thereby imposed and an intention to perform them. The *dictum* of Lord Chief Justice Cockburn—relied on in support of the contention now under consideration, and which was as follows: "that the communication (i.e., in order to be privileged) be made not merely in the course of duty, that is, on an occasion which would justify the making it, but also from a sense of duty"—has reference to a very different state of circumstances to that which exists in the present case. The case is that of *Dawkins v. Lord Paulet*.⁽¹⁾ and has reference to

1876.

SHEPHERD,
"THE TRUSTEES OF THE
PORT OF
BOMBAY."

1876.

SHEPHERD
v.
THE TRUS-
TEES OF THE
PORT OF
BOMBAY.

an alleged libel contained in a report by the commanding officer of a regiment to the adjutant-general, with regard to the military incompetence and unfitness of the plaintiff, who was an officer in the same regiment. It may well be that in such an isolated, or at least occasional, occurrence as writing a report of the conduct of an officer, the necessity of the existence of an actual *sense* of duty in making such report should be insisted on, in order that the report be privileged.

Then, was this publication excluded from being privileged by reason of absence of *bona fides* on the part of the Trustees in making it; or, in other words, did they make it, not believing the resolutions to be warranted by the facts and circumstances of the case so far as the same were then known to them? If they did not honestly believe the resolutions to be so warranted, that is a fact from which express malice on their part can be inferred, and the existence of express malice, whether inferred from the absence of such honest belief, or from any other facts or circumstances of the case, would, as we have seen, prevent the publication from being a privileged one. The existence of such express malice is, however, a matter to be proved on the part of the plaintiff. It is not enough that the facts proved are *consistent* with the presence of malice as well as with its absence: *Somervill v. Hawkins*⁽¹⁾. This question of express malice, however, is raised by the 5th issue, and it will be more convenient to consider it after considering the 6th issue, which raises the question, whether, in fact, the acts and conduct of the plaintiff justified the passing and recording of the said resolutions. For the purpose of finding on the 3rd issue, so far as this question is concerned, it will be sufficient to intimate my opinion that the resolutions in question were honestly believed by the Trustees to be warranted by the facts and circumstances of the case, so far as the same were known to them and were fairly, i.e., reasonably, believed by them on the ground of such facts and circumstances, that the alleged crimina-

1876.

SHEPHERD
v.
THE TRUSTEES OF THE
PORT OF
BOMBAY.

copies of them to the Secretary to Government and to the plaintiff himself, there is no evidence in the case from which the existence, on the Trustees' part, of express malice can be inferred.

If the transmission of a copy of the resolutions to Government was privileged, as being an act done in obedience to an Act of the Legislature, I am of opinion that the recording of such resolutions, and causing them to be copied for record by clerks in the employ of the Trustees, was (if a publication in itself) privileged. How *could* a copy of the minutes of proceedings be transmitted to Government, unless first recorded and copied? As to the employment of clerks to copy the resolutions for the purpose of record or transmission, if it be in itself a publication, it is, in my opinion, privileged if the record and transmission be privileged. In the case of *Lawless v. The Anglo-Egyptian Company*⁽¹⁾, already cited, the employment of a printer by the corporation, which was defendant, to print a report, (the statements in which were complained of by the plaintiff in that case,) for distribution among the shareholders of the corporation, was held not to be a circumstance which prevented the publication from being privileged, and the employment of a printer, an entire stranger, so far as appears, to the corporation, seems to me to be a stronger case than where a document is copied by *employés* of the corporation itself. Mr. Justice Mellor seems to have considered that it would be going against what he calls "progress" for the Court not to recognize the convenience and common employment of the art of printing, and I think, in the present case, we may without difficulty recognize the convenience and common employment of the much more ancient art of writing, and, further, that a corporation, which cannot itself write, must of necessity, if there is lawful occasion to make a written record or copy at all, make it by the hands of persons employed for that purpose.

Were, then, the Trustees privileged in recording the resolutions at all? In the case last referred to⁽²⁾, and in the American case there cited⁽³⁾, the Court seems to have been of opinion, that though the circulation of a report and evidence to the shareholders of a cor-

(1) L. R. 4 Q. B. 262.

(2) *Lawless v. Anglo-Egyptian Company*, L. R. 4 Q. B. 262.

(3) *Philadelphia, &c., Company v. Quigley*, 21 How. 202.

1876.

SHEPHERD
v.
THE TRUS-
TEES OF THE
PORT OF
BOMBAY.

poration, containing statements in themselves defamatory of an officer of the corporation, may be privileged, yet that the preservation of the report and evidence in a book, for distribution among the persons belonging to the corporation, was not protected by privilege; or, as Mr. Justice Hannen expresses it, "If, after the report had served its purpose, by making known to the shareholders facts which it was for their interest to know, the statement had been entered in the books of the company to stand for ever a record against the plaintiff that he had had an accusation made against him, that might have been independent evidence of malice on the part of the company." But in those cases there is nothing said of what exists here, that there is a duty imposed by an Act of the Legislature, on the Trustees, of drawing up minutes of all their meetings, and of fairly entering them in a book to be kept for that purpose, which minutes are to be open at the office of the Trustees to the inspection of any Trustee at all reasonable times⁽¹⁾. It will be seen that the Court, in the case of the Anglo-Egyptian Company⁽²⁾, treat the keeping on record of a defamatory statement as possible evidence of express malice; but where the record is kept in obedience to an Act of the Legislature, the mere fact of keeping such record can afford no such evidence, and it cannot, in my opinion, make any difference that two copies are kept: one the scroll minute book, in which the rough resolutions are preserved, and the other the fair minute book, in which the rough resolutions are fairly copied out. A fair minute book is kept under the express directions of the Legislature; the scroll minute book is, it seems to me, necessary or useful to be kept, for the purpose, if occasion requires, of verifying the fair minute book. At any rate, the fact of preserving such scroll minute book, when it appears to be the practice of the Trustees to preserve it in all cases, cannot, where the Trustees are bound by law to keep a fair minute book, afford in

publication of them not privileged. With reference to this, it is to be observed that, according to the evidence, the sending of any copy of the resolution of 10th February 1876 (which really contains the alleged libel) to the plaintiff does not seem to have been an act of the Trustees themselves as a body, but of their chairman, General Ballard alone. In delivering judgment on the injunction motion I made use of some expressions, with regard to this proceeding, (which I then supposed to have been directed by the Trustees themselves), which, had the whole of the evidence which has since been given been before me, I should not have used. After hearing the evidence of General Ballard (the then chairman of the Port Trustees) on this point, I am satisfied that though, no doubt, the receipt of such letters could not be supposed to be agreeable to the plaintiff, yet that General Ballard directed that the resolution in full should be sent for the reason that, as he (General Ballard) says, he "thought it fair that the plaintiff should know that this resolution had been passed, as the plaintiff might wish to explain or answer it." He says, further, "I had no other object than this in sending the exact words. I had no intention to wound or annoy Mr. Shepherd." However, supposing that the sending of the resolution of 10th February to the plaintiff in its full form to have been an act for which the Trustees, as a body, are responsible, (and I think, having regard to the form of the resolution of 17th February, it is so), and supposing that the causing copies of the Secretary's draft letters, embodying the resolution themselves, to be made by the clerks, for the purpose of being sent to the plaintiff, was also an act for which the Trustees, as such, are responsible, yet I am of opinion that as the sending of the Secretary's letters to the plaintiff himself was privileged, the customary and necessary co-operation of writers in such sending was in like manner privileged. This conclusion seems to me to be supported by the language of Parke, B., with reference to one point in the case of *Toogood v. Spyring*⁽¹⁾ already cited. There one of the matters complained was that the defendant had made a defamatory charge or statement of the plaintiff, who had been employed as a carpenter to do some work at the defendant's house. The charge or statement

1876.

SHEPHERD
v.
THE TRUSTEES
OF THE
PORT OF
BOMBAY.

(1) 1 Cr. M. & R. 193; 8 C. 4 Ex. 582.

1876
SHEPHERD
v.
THE TRUS-
TEES OF THE
PORT OF
BOMBAY.

was made to the plaintiff, but in the presence of a third person who had no interest in the matter. It was held by Parke, B., that the mere fact that a third person is present, when such a charge is made to the person himself whom it concerns, does not prevent the statement from being privileged. The presence casually of the third person when a charge is made to the person affected by it, seems to me quite analogous to the present case of the employment of clerks to fair-copy letters intended to be addressed to the person, whose conduct has been, as alleged, injuriously animadverted upon by the resolutions forwarded by such letters. So that, even supposing that the sending of the letters of the Secretary, of 11th and 18th February, forwarding the resolutions themselves, was a proceeding for which the defendants are responsible, and that, by reason of their presumed cognizance of the course of business in the office, the publication (if it was such) of the resolutions to the office clerks was also the act of the Trustees, yet I am of opinion, that as the sending of the resolutions to the plaintiff himself was a privileged communication, the incidental but necessary co-operation of the Secretary in making a draft of the letters in question, and of the office clerks in fair-copying the Secretary's draft letters, was covered by the same privilege, and that, further, from the necessary employment of the agency of such Secretary and clerks, no inference can be drawn of the existence of express malice.

plaintiff in September 1875. The defendants' counsel, as also the plaintiff's counsel in reply, have expressed the desire of the defendants and the plaintiff, respectively, to have the Court's opinion on the issue of justification, whatever might be the finding on the issue of privilege; and having regard to the question raised, of express malice and absence of *bona fides*, I consider it necessary and proper to express such opinion.

[His Lordship, then, with a view to determining the 6th and 5th issues, which raised the questions of justification and express malice, considered the evidence at considerable length, after which he resumed]

I have come to the conclusion, which I express, though unwillingly, that the acts and conduct of the plaintiff, in reference to the steamer "Dromedary," did, in fact, constitute a serious ground for the dissatisfaction of the Trustees with the plaintiff, and a sufficiently serious ground to warrant them in resolving to avoid further transactions with him, if possible, or, in other words, that the acts and conduct of the plaintiff justified the defendants in passing the resolutions they did, and, if so, their recording it was only in obedience to their Act

Having regard to the conclusion at which I have arrived on the issue of justification, it is not necessary to say anything on that of express malice, except only that I do not find any evidence whatever of it.

[His Lordship, then, after recording his findings on the 1st and 2nd issues in favour of the plaintiff, and on all the others in favour of the defendants, continued :]

With regard to the costs, I must observe that but for some allegations in the plaint, and particularly those of express malice and want of *bona fides*, the defendants would probably have been content to rest their defence on the issue of privilege. In that case the hearing would probably have lasted only two days instead of twenty, and I should have been disposed to order that each party should bear his own costs. But as the plaint contains allegations of express malice and want of *bona fides*, the defendants were bound to go into the defence of justification, which has been the main cause of this suit having been so protracted. The

1876.

SHEPHERD
v.
THE TRUSTEES
OF THE
PORT OF
BOMBAY.

1876.
SHEPHERD
2.
THE TRUS-
TEES OF THE
PORT OF
BOMBAY.

defendants have succeeded in their defence of justification; and having regard to this, and to the nature of the allegations of the plaint to which I have referred, I am of opinion that the plaintiff ought to bear the costs of this suit. The issues, therefore, will be found as above mentioned, and the decree is that this suit be dismissed with costs to be borne by the plaintiff, including the defendants' costs of showing cause against the rule *nisi* for injunction and the notice of motion of 16th March 1876.

[ORIGINAL CIVIL JURISDICTION.]

Suit No. 211 of 1876.

December 4.

HA'JI JAKARIA (PLAINTIFF) v. HA'JI CASIM (DEFENDANT).

Partnership—Production of documents—Inspection.

One partner of a firm represents the other partners for the purposes of production of documents.

Therefore, where the plaintiff, alleging that he had been a partner with the defendant and others, in the firm of Ibrahim Kadu and Co., and that on the dissolution of that firm, the amount then standing to his credit in the partnership books had been carried to his credit in the books of a new firm, in which he and the defendant only were partners, applied for an order on the defendant to produce, for the plaintiff's inspection, the books of Ibrahim Kadu and Co., which application was resisted by the defendant, on the ground that the other partners in the firm of Ibrahim Kadu and Co. had an interest in those books, and were not parties to the present application, or shown to have consented to it.

Held that the plaintiff was entitled to the order.

THE plaint alleged that, prior to the year 1862, the plaintiff had been a partner with the defendant and certain other persons, named in the plaint, in the firm of Ibrahim Kadu and Co.; that in 1862 this firm was dissolved, and the amount then standing to the credit of the plaintiff in the partnership books had been carried to his credit in a new firm, Haji Abdul Sakur Haji Kadu, in which he and the defendant only were partners; and prayed for an account, dissolution, and payment of the amount due to the plaintiff. The books of the firm of Ibrahim Kadu and Co. had been lodged in the office of the Master in Equity, under an order obtained against that firm in a former suit by another plaintiff.

produce and lodge in Court, or in the office of his solicitors, all the account books, documents, papers, writings, releases, deeds, memoranda, and partnership agreements of the firm of Ibrahim Kadu and Co., and allow the plaintiff inspection thereof with liberty to take copies of them.

1876.

Haji Jahan-
RIA
v.
Haji Cassim.

The summons was argued before SARGENT, J.

Farran, for the defendant, in showing cause contended that the partners other than the defendant in the firm of Ibrahim Kadu and Co. had an equal interest with him in the books of that firm, and inasmuch as they were not parties to the present suit, nor were shown to have consented to the production of those books, the order for production could not be granted.

Starling for the plaintiff in support of the summons.

SARGENT, J.:—The question is whether production is to be ordered of certain documents, and especially of the partnership books belonging to the firm of Ibrahim Kadu and Co., for the purpose of being inspected by the plaintiff. The plaintiff alleges that he was a partner in that firm, and that a sum of money was caused to be carried to his separate account in the books of that firm. The objection to their production is that the defendant is not the only person interested in the books in question, but that the other partners in the firm of Ibrahim Kadu and Co., who are not parties to this suit, and who are not shown to consent to the production of the books, are also interested in them. The books are at present in the possession of the Master in Equity, an officer of this Court, and the question is,—Will the Court order their production? Now there appears to be no settled practice in cases of this nature—it is advisable, therefore, to consider the English authorities.

The rule of the Court of Chancery in England is thus laid down by Lord Cottenham in *Taylor v. Rundell*⁽¹⁾: "If a defendant has a joint possession of a document with somebody else, who is not before the Court, the Court will not order him to produce it, and that for two reasons: one is, that a party will not be ordered to do that which he cannot or may not be able to do; the other is, that another party, not present, has an interest in the document which the Court cannot deal with." In *Murray v. Walter and*

⁽¹⁾ Gr. and Phil. 104, see p. 111; S. C. 1 Y. and C. Ch. 123; 5 Jur. 1129.

1876.
 HAJI JAKA-
 RIA
 v.
 HAJI CASIM.

Reid v. Langlois⁽¹⁾, Lord Cottenham refused to order production by a partner or his agent, all the other partners not being before the Court, adding that the rule was well established, and could not be considered as open to dispute. Other judges, however, have struggled to escape from applying the rule in all its strictness. Lord Langdale in *Lopez v. Deacon*⁽²⁾, whilst feeling himself bound by it, expressed his disapprobation of it. He says : " Lord Cottenham states distinctly that you cannot order the production of papers on the admission of one person, if other persons are interested in them. I cannot, therefore, in the face of those decisions make an order for the production of these papers. The effect will be merely to increase the expense of the suit ; for, in one of two ways, the contents of these papers may certainly be had. The plaintiff may either make all the persons interested, parties to the suit, or he may press the defendant for a full discovery of the contents of these documents by his answer. I think that, if the power of the Court is to be really restricted in the way that is alleged, the only effect will be to increase the expense of obtaining the discovery which the plaintiff is entitled to." Lord Truro in *Glyn v. Caulfield*⁽³⁾ said : " As regards the case before me, it is one of that class in which it is considered that convenience, if not necessity, requires that some of the shareholders in a company should represent the rest for the purposes of litigation. In *Taylor v. Rundell*⁽⁴⁾, Lord Cottenham observes : ' If a defendant has a joint possession of a document with somebody else, who is not before the Court, the Court will not order him to produce it, and this for two reasons : the one is, that a party will not be ordered to do that which he cannot or may not be able to do ; the other is, that another party, not present, has an interest in the document which the Court cannot deal with.' The present case does not fall within either of these reasons : the defendants, physically speaking, can produce the documents, and, legally speaking, they ought to produce them, because there is no other person having an interest distinct from their own interest,—that is the common partnership interest.—"

the defendants should not be ordered to produce the documents. It appears to me, therefore, that neither of these decisions of Lord Cottenham militates against the production of the documents; and that the present case is not within the principles, as stated by Lord Cottenham, upon which protection has been given; and I may add that, in *Lopez v. Deacon*⁽¹⁾ Lord Langdale intimated his disapprobation of exempting from production in such cases." Notwithstanding the doubts thus expressed by Lord Langdale and Lord Truro, we find the Lord, Justices treating the rule as too well established to be departed from, in *Hadley v. Macdougall*⁽²⁾.

As to the Courts of Law, it is stated in Lush's Practice of the Supreme Courts of Law, as the old practice, that if the documents are in the custody of the party, inspection will be ordered, though other persons not parties to the action have also an interest in them: the question being simply whether the Court is satisfied that the document is in his control. *Shaw v. Holmes*⁽³⁾ *Steadman v. Arden*⁽⁴⁾.

Since the Statute 14 and 15 Vic., C. 99, and the Common Law Procedure Act, it would appear that the power to grant inspection is only limited by what the Court may think just, *Hill v. Campbell*⁽⁵⁾, where the question is very fully discussed. *Plant v. Kendrick*⁽⁶⁾ shews what little regard the Court pays to the mere fact of other parties being interested in the books. Such being the state of the English authorities, it appears to me that it would be highly inconvenient to follow the strict rule of the Court of Chancery more especially having regard to the circumstance that it is not the practice here, even if we have the power, to add parties to the record who are not interested in the suit. At the same time I think that, although unfettered by any strict rule forbidding production in such cases, the Court should be governed by all the circumstances of each case in determining whether the order for production would, in the language of the Common Law Procedure Act, "be just." In the present case I think that the other members of the partnership are sufficiently represented by the defendant Haji Casim, and that the books should be produced in the Master's office on notice to the defendant.

1876.

HAJI JAKA-
RIA
v.
HAJI CASIM.

(1) 6 Beav. 254.

(2) L. R. 7 Ch. Ap. 312.

(3) 3 C. B. 952.

(4) 15 M. and W. 587; S. C. 4 D. and L. 16; 10 Jur. 553; 15 L. W. Exch. 310.

(5) L. R. 10 C. P. 222; 23 W. R. 336; 44 L. J. C. P. 97; 32 L. T. N. S. 50.

(6) T. R. 10 C. P. 602.

[APPELLATE CIVIL JURISDICTION.]

*Special Appeal No. 263 of 1876.*1876.
November 23.GOVIND RAGUNA'TH (PLAINTIFF, APPELLANT) v. GOVINDA JA'GOJI.
(DEFENDANT, RESPONDENT).*Possession—Sale in execution—Assignment.*

Upon a sale in execution of a decree the property in the thing sold passes to the purchaser; and there is nothing in either the Hindu or the English law which debars a third person from taking an assignment of such property from the auction-purchaser, albeit it has not been reduced into possession by him.

THIS was a special appeal from the decision of Edward Cordéaux, Senior Assistant Judge, F. P., at Sholápur, reversing the decree of the Subordinate Judge of Sholápur.

The following are the facts of the case:—

The plaintiff set forth that Nágu obtained a decree against Dattu, and attached Dattu's premises in execution. Subsequently Shidram attached the same premises in execution of a decree against Dattu's brothers; eventually the premises were sold to the defendant on the 27th September 1872, in execution of Shidram's decree, the Court having decided that Nágu's attachment was fraudulent; but this decision was afterwards set aside, and the premises were again put up to sale in execution of Nágu's decree, and purchased by Nágu himself on the 21st August 1873 for Rs. 500. Nágu sold them to the plaintiff for Rs. 200. The plaintiff endeavouring to take possession of the same premises was obstructed by the defendant, who was in possession as purchaser at the sale under Shidram's decree. The plaintiff accordingly filed this suit for possession.

"Whether the transfer of the premises by sale to the plaintiff by Nágu is invalid by reason of Nágu not being in possession of the said premises at the time of such sale."

1876.

GOVIND
RAGUNÁTH
"GOVINDA
JAGOJI.

He found it in the affirmative for reasons given below :—

"Nágu purchased the right, title, and interest of his judgment-debtor, and obtained the Court's certificate. That certificate is deemed to be a valid transfer of such right, title, and interest. By Hindu law it is not absolutely necessary that the purchaser should be put in possession, and the provision of Section 259 of the Code of Civil Procedure is consistent with this principle. But if the purchaser before he is put in possession sells merely the document which certifies his purchase of the right, title, and interest in certain property, can he be said, by any force of argument, to be in possession of the property sold? It is evident how important possession of the property sold is before the holder of the Court's certificate can transfer all his rights in that property by sale. The judgment-debtor's right, title, and interest in the property sold may be worthless, and the purchaser may know it to his cost; but he may find some one enterprising enough to undertake what he despairs of accomplishing, and transfer by sale all his risk to him. This is plainly against policy and justice, and tending to promote unnecessary litigation." * * *

Mr. Cordeaux, therefore, rejected the plaintiff's claim with costs.

The special appeal was heard by KEMBALL and PINHEY, JJ.

Máneksháh Jekúngirsháh, for the plaintiff, the special appellant:—Nágu having purchased the right, title, and interest of Dattu and obtained a certificate of sale held under Section 259 of the Civil Procedure Code a legal right to possession; and there was nothing to prevent his transferring that right to the plaintiff. The cases which rule that the vendor of immoveable property should be in possession of it at the time of the sale, apply to the sale of lands and houses as such, and not to the transfer of rights over immoveable property :—*Nánábhái v. Tukárám*⁽¹⁾. Possession cannot be indispensably necessary in all cases; for were it so, a person who has mortgaged his property with possession could not

⁽¹⁾ Decided by Melvill and West, JJ., on the 22nd December 1873.—See page

1876.

GOVIND
RAGUNATH
v.
GOVINDA
JAGOTI.

sell the equity of redemption. Want of possession in the vendor does not render the sale *ipso facto* void.—*Lokenath Ghose v. Jugobundhoo Roy*⁽¹⁾. It is only circumstance which weakens the presumption of the *bona fides* of a transaction. In the present case the transaction was undoubtedly *bona fide*.

Honourable V. N. Mundlik, Acting Government Pleader, for the special respondent :—The sale in this case was a speculative one, the vendor not being in possession, and, therefore, opposed to justice and policy as held by the Court below. In *Kachu v. Kachoba*⁽²⁾ it was held that a change of possession was necessary to complete a sale of corporeal property to prevent successive purchasers from being cheated by successive sales and to obviate disputes as to what was really sold. A purchaser without possession from a Hindu vendor did not obtain an enforceable title.

PER CURIAM :—We are of opinion that the Assistant Judge was wrong in throwing out this claim on the ground that the assignment to the plaintiff was invalid. Upon a sale in execution of a decree the property in the thing sold passes to the purchaser, and we know of nothing in either the Hindu or the English law which debars a third person from taking an assignment of such property from the auction-purchaser, albeit it had not been reduced into possession. This is not the case of a speculative claim such as this Court has refused to recognize, and we are unable to concur in the view taken by the Assistant Judge that the sale of such a title is “against policy and justice and tending to promote unnecessary litigation.” We reverse the decree of the lower Court, and return the case in order that the claim may be disposed of on the merits. Costs to follow final decision.

⁽¹⁾ 10 J. L. R., 1. Calo. 297.

⁽²⁾ 10 Bom. H. C. Rep. 491.

[ORIGINAL CIVIL JURISDICTION.]

*Reference from the Court of Small Causes.**Suit No. 7026 of 1876.*

NATHA HIRA AND ANOTHER (PLAINTIFFS) v. JANARDHAN RAM-
CHANDRA AND ANOTHER (DEFENDANTS)

1876.

December 15.

Limitation—Act IX. of 1871, Schedule II, Cl. 72—Promissory note—Novation.

The holder of a promissory note, payable on demand, dated 14th April 1870, demanded payment on 8th December 1872. The maker then paid interest in advance up to 1st April 1873; upon the condition that the holder should make no demand until that date.

Held that this transaction amounted to the substitution of a new contract for that contained in the promissory note; that the period of limitation must be reckoned from 1st April 1873; and that, consequently, a suit to recover the balance due on the note, instituted on 27th March 1876, was not barred.

THE following case was stated for the opinion of the High Court in accordance with Section 55 of Act IX. of 1850 by J. O'Leary, First Judge of the Court of Small Causes at Bombay:—

"1. The action in this case was brought for the recovery of a balance alleged to be due by the defendants to the plaintiffs on a promissory note, bearing date 14th April 1870.

The said note purported to be payable on demand.

"3. The first unqualified demand on the note was made on or about the 8th December 1872.

"4. This suit was instituted on the 27th March 1876.

"5. The defendants pleaded the Law of Limitation as a bar to the claim, the first absolute demand having been made more than three years before the institution of the action.

"6. The plaintiffs contended that the period of limitation ought to be computed from 1st April 1873, and relied upon the following facts (which were proved to the satisfaction of this Court) in support of their contention:—

(a) On the 8th December 1872, the defendants made a proposal to the plaintiffs, which, translated into English, was in the following words:—

'We pay you now interest up to the 1st April 1873.
You are not to make any demand from us until the

1876.

NATHA HIRA
v.
JANARDHAN
RAMCHANDRA

(b) The plaintiffs at once accepted this proposal.

(c) The defendants, immediately on the plaintiffs' acceptance of their proposal as aforesaid, paid to the plaintiffs interest on the note up to the 1st day of April 1873.

(d) At the same time one of the defendants (Janardhan Ramchandra) with the knowledge and consent of his co-defendant wrote a memorandum upon the note in the following form:—

' 8th December 1872, paid interest up to 1st April 1873.'

"7. During the interval of time that elapsed between the 8th December 1872 and the 1st April 1873, the plaintiffs made no demand for repayment of the amount secured by the note.

"8 Upon this evidence the Fourth Judge who tried the case disallowed the plea of limitation and gave judgment for the plaintiffs for the amount claimed.

"9 The defendants obtained a rule *nisi* for a judgment in their favour on the ground that the Fourth Judge was in error in holding that the plaintiffs were entitled to sue within three years from 1st April 1873.

"10. The First and Fourth Judges, before whom the rule *nisi* came on for argument, discharged the rule subject to the opinion of the High Court, which we have now the honour to solicit upon the question.

"Whether the plaintiffs were entitled to bring their suit within three years from the 1st April 1873 under the circumstances stated in this case?"

The reference was considered by WESTROPP, C.J., and SAR-

demand for the principal, and to forbear to sue until that day. Hence the period of limitation must be reckoned from that day, and the suit, having been brought on the 27th March 1876, is not barred. The verdict, therefore, should stand.

1876.

NATHA HIRA
v.
JANARDEAN
RAMCHANDRA

[ORIGINAL CIVIL JURISDICTION.]

Reference from Court of Small Causes.

Suit No. 27039 of 1876.

HEARN AND OTHERS (PLAINTIFFS) v. BAPU SAJU NAIKIN (DEFENDANT.)

December 15,

Attorney and client—Bill of costs—Limitation—Act IX. of 1871, Schedule II.,

Clause 85—Act VIII of 1859, Section 206.

A solicitor was retained in July 1871 to execute a decree. In November 1871 a prohibitory order was made in the cause after which the solicitor did nothing more in the matter. In June 1872 the decree holder and judgment-debtor settled the matters in dispute between them without the knowledge of the solicitor, but this compromise was not made through, or certified to, the Court which passed the decree. In a suit brought in December 1875 by the solicitor against the decree-holder to recover the amount of his bill of costs.

Held that the plaintiffs' claim was not barred by Article 85 of Schedule II. to Act IX. of 1871.

THIS was a case stated for the opinion of the High Court, under Section 55 of Act IX. of 1850, by J. O'Leary, First Judge of the Court of Small Causes at Bombay.

The plaintiffs, who are a firm of solicitors in Bombay, were retained by the defendant in July 1871 for the purpose of executing a decree which had been obtained by the defendant. In November 1871 a prohibitory order was made in the cause, after which no further work was done in the matter by the plaintiffs for the defendant.

In June 1872 the defendant and her judgment-debtor settled the matters in dispute between them without the knowledge of the plaintiffs; but this compromise was not made through or certified to, the Court which passed the decree.

On the 11th December 1875 the plaintiffs instituted the present suit against the defendant, to recover from her the amount of their bill of costs. The defendant pleaded limitation, and relied

1876.
HEARN AND
OTHERS
v.
BAPU SAJU
NAIKIN.

on Clause 85 of Schedule II. of Act IX. of 1871. The Third Judge of the Court of Small Causes, who tried the case, found a verdict for the plaintiffs for the amount claimed. The defendant then moved for a new trial before the First, Third, and Fourth Judges, who, having differed in opinion, ordered the verdict for the plaintiffs to stand, subject to the opinion of the High Court on the question, "Was the claim of the plaintiffs barred by the law of limitation?"

At the hearing of the reference by WESTROPP, C.J., and SARGENT, J., on the 15th December 1876, *Macpherson* (for *Marriott*, Acting Advocate-General), on behalf of the plaintiffs:—Clause 85 of Schedule II. of Act IX. of 1871 is no bar to the present suit, for there has been here no discontinuance by the attorneys of the business which they were conducting for the defendant, nor has that business terminated. The compromise between the defendant and her judgment-debtor cannot be recognized by the Court (Act VIII. of 1859, Section 206), and therefore the Court cannot hold that that compromise was the "termination of the suit or business" in respect of which these costs became due. *Whitehead v. Lord* governs the case.

There was no appearance on behalf of the defendant.

PER CURIAM:—Let the decree for the plaintiffs by the Court of Small Causes stand. The costs of this reference must be paid by the defendant.

[ORIGINAL CIVIL JURISDICTION.]

Where an intestate Parsi left him surviving a widow, sons, daughters, children of a predeceased son, and the widow of another predeceased son, who had died without issue, and a posthumous daughter was afterwards born to the intestate,

Held that such last-mentioned widow was entitled to one moiety of the share in the intestate's estate which her husband would have taken had he survived the intestate, and that the other moiety of such share devolved on the surviving issue of the intestate, including the posthumous daughter, and the children of his other predeceased son.

1877.

MANCHERJI
KAWASJI
DAVUR AND
ANOTHER
v.
MITHIBHAI.

KAWASJI NANABHAI DAVUR died intestate at Bombay on 22nd December 1873, leaving him surviving his widow, the defendant; two sons, the plaintiffs; Dinbai the widow, Rastamji the son, and Mithibhai, the daughter of a predeceased son, Kharsedji, who died on 8th June 1872; Awabai, the widow of a predeceased son, Naserwanji, who died without issue on 28th May 1872; and three daughters, Serinbai, Dhunbai, and Jerbai. A posthumous daughter was afterwards born to the intestate. Letters of administration were granted to the plaintiffs and defendant, and in 1874 the plaintiffs filed against the defendant this administration suit praying, amongst other things, for an enquiry as to who were the persons entitled to share in the estate of the intestate. At the hearing of the suit Awabai appeared by counsel and applied to be made a party. On 25th June 1875 an order was made in the suit referring it to the Commissioner to take the usual accounts, and directing "an enquiry as to who were the persons entitled according to the Acts of the Legislative Council of India for the distribution of Parsi Intestates' Estates living or *in gremio parentis* at the time of the death of the said intestate, Kawasji Nanabhai Davur, and whether any of them are since dead, and if so, who are their legal representatives." The order also directed that Awabai should be allowed to appear on the enquiry before the Commissioner, and on further directions on his report. The Assistant Commissioner accordingly proceeded to take the accounts and make the enquiries directed by the order of 25th June 1875, and being of opinion that under the provisions of the Parsi Succession Act (XXI. of 1865), Awabai took no interest in the estate of the intestate, made his special report to that effect on 12th December 1876; and thereby also defined the shares to which the other representatives of the intestate were respectively entitled on the supposition that Awabai was not entitled to any share. To this

1877.

MANCHERJI
KAWASJI
DAVUR AND
ANOTHER
v.
MITHIBAI.

special report Awabai filed objections on 23rd December 1876, in which she contended that she was entitled either to the whole or one-half of the share which her husband, Naserwanji, would have taken, had he survived the intestate.

The cause was called on before GREEN, J., on 27th June 1877, for further directions on the special report of the Assistant Commissioner, and argument of the question raised by Awabai's objections thereto.

Marriott, Advocate-General (Acting), and *Farran*, for Awabai abandoned the claim to the whole of the share which Naserwanji would have taken had he survived the intestate, but contended that to a moiety of that share she was entitled. On a true construction of Section 5 of Act XXI. of 1865, if there is no issue of the child of the intestate, but a widow, such widow will take the share provided for a widow by Section 6. The omission from Section 5 of the word "leaving," which occurs in the preceding sections, is significant. Section 7, on which the Assistant Commissioner appears to have relied in arriving at his decision, has no application to the present case, as the intestate here has left lineal descendants. Before the passing of this Act, Parsis, in the town and island of Bombay, were, as to succession, governed by the English law as modified by Act IX. of 1837: 2 Williams on Executors, 1496. It is only under Section 5 of Act XXI. of 1865 that the children of a predeceased child can take at all. The word "children" cannot include grand-children. Section 7 shows that it was considered by the Legislature that lineal descendants, however remote, had been provided for by the earlier sections of the Act. Under the 5th section the issue of a deceased child take though there is no widow. That section cannot be construed in one way as regards the issue and in another way as regards the widow. The reasonable construction is that, where there is no issue of the predeceased child, his widow's share is cut down, by the 7th section, to one-half of the share which the predeceased child would have taken, had he survived the intestate. The first six sections of the Act are intended to embrace all cases of a Parsi leaving lineal descendants or a widow. It is unreasonable that a widow who has no children, and is therefore in greater need of support, should be deprived of

7 as an exception. Section 5 places the widow and issue in the same position as if the property had been that of the deceased child. To read "widow *or* issue," instead of "widow *and* issue," would make nonsense of the section.

Latham for the plaintiffs :— The 5th section only applies in the case of the predeceased child having left a widow and children, which is not the case here. Prior to the passing of this Act, the daughter-in-law of a Parsi intestate would have got nothing; and therefore, if she is to take anything now, it ought to be explicitly given by the Act. The only section of the Act which does explicitly give the daughter-in-law anything is the 5th, and under this she is only to take, in the event of there also being issue of her marriage. By the 7th section and the 2nd schedule of the Act, the widow of a son, dying without leaving lineal descendants, succeeds in the 10th degree; whereas if the 5th section applied to such widow, she would take at least one-half before any of those mentioned in the first 9 clauses of the 2nd schedule as having a prior title to the whole. According to the construction sought to be put upon the 5th section on behalf of Awabai, if a man died leaving a father and a son's widow only, and no lineal descendants, the widow would be entitled to one-half, but by the distinct wording of the 7th section and the 2nd schedule the father is entitled to the whole.

Mayhew for the defendant :— It is Section 5, not Section 7, which is the rider to the Act, for Section 5 is the only section which refers to substitution. If it had been one of the express objects of the Act to deal with the succession in the case of a child of the intestate dying in the life-time of the latter, we should have expected much more elaborate provisions. If the Legislature has used language which can only bear one meaning, and contemplating only one event, it is not for the Court to alter that language to meet a supposed hardship. The 2nd schedule shows that the intention could not have been to make the substituting clause give the widow one-half of the share of a predeceased child. Succession under a substituting clause is not a natural succession; therefore the hardship is not so great as alleged. If the construction contended for by Awabai be adopted, we shall have this amazing result, that the widow of a predeceased son will get from the estate of the inte-

1877.

MANCHERJI
KAWANJI
DAVE AND
ANOTHER

MITHIBAI.

1877.

MANCHERJI
KAWASJI
DAVUR AND
ANOTHER
v.
MITHIBAI.

tate share equal to that of the intestate's widow, and twice as great as that of one of his own daughters.

Marriott in reply :—That amazing result would have followed as a matter of course if the predeceased son had survived his father by a single hour. The only reasonable construction is to read the 5th section distributively. The condition of "leaving issue" has been intentionally omitted from this section.

GREEN, J. :—The question for decision here is as to the correctness of the report of the Assistant Commissioner of this Court, dated the 12th December 1876, that Awabai, the widow of one Naserwanji Kawasji Davur (one of the sons of Kawasji Nanabhai Davur, the intestate in the cause), is not entitled to any share in the property of the said intestate. The intestate died on the 22nd December 1873, leaving, as appears by the report, a widow Mithibai, two sons, Mancherji and Dorabji, the widow (Dinbai) and son [Rastamji] and daughter [Mithibai] of a son Kharsedji, who predeceased his father Nanabhai on the 8th June 1872, and three daughters, Serinbai, Dhunbai, and Jerbai. The said Mancherji, Dorabji, Kharsedji and Naserwanji were the sons, and the said Serinbai was the daughter of the intestate by his second wife, Motlibai; and the said Dhunbai and Jerbai were his daughters by his surviving wife and widow, the said Mithibai. The son Naserwanji died in the life-time of his father on the 28th May 1872, leaving a widow, the said Awabai, but no issue. The question depends on the construction to be put on Act XXI. of 1865, "an Act to define and amend the law relating to intestate succession amongst Parsis," and in particular on Section 5, which is as follows :—"If any child of a Parsi intestate shall have died in his or her life-time, the widow or widower and issue of such child shall take the share which such child would have taken if living at the intestate's death in such manner as if such deceased child had died immediately after the intestate's death." Now

child had died immediately after its parent. This seems to me the natural grammatical sense of the words of the section. In my opinion, it is not necessary, so far as the natural and grammatical sense of the words of the section are concerned, that in order for the widow or widower to take, and for the issue to take, there should be in existence at the time of the death of the intestate, both widow or widower *and* issue; otherwise we should have this consequence, which it is impossible to suppose could have been the intention of the Legislature—viz., that the issue of a predeceased son or daughter of an intestate Parsi would take nothing if the widow or widower of such predeceased son or daughter happened also to be dead at the time of the intestate's death; in other words, that such issue should take if they had one parent surviving, but should take nothing if wholly orphans. Whichever way Section 5 may be construed, the position of the widow or widower of a predeceased son or daughter has been changed by the Act as compared with the previous law. Under that law such widow or widower would have taken nothing, whether there were issue or not; but it is evident that under Section 5, if there be both widow or widower and issue, the widow takes something. So that there was in any event on the part of the Legislature an intention to change, in some respects at least, the position of the widow or widower of a predeceased son or daughter of an intestate Parsi. It is not necessary, in my opinion, to consider on the present occasion the position of the widow or widower of a predeceased son or daughter in the cases to which Sections 6 and 7 apply—to cases, namely, of a Parsi dying, leaving a widow or widower, but without leaving any lineal descendants, and of a Parsi dying, leaving neither lineal descendants nor a widow or widower. The fact that in Schedule 2 to the Act the widows of sons and widowers of daughters have a place in the succession in the case to which Section 7 applies inferior to those of father and mother, brothers, grandfather and grandmothers, cousins and nephews and nieces of the intestate, seems to throw great difficulty in reading Section 5 merely as a proviso to, and overruling Sections 6 and 7, which otherwise might be a reasonable way of construing the Act. A curious result, however, would appear to flow from these Sections 6 and 7 taken together, with reference to the widow or widower of a predeceased

1877.

MANCHERJI
KAWARJI
DAVUR AND
ANOTHER,
v.
MITHIBAI.

1877.

MANCHERJI
KAWASJI
DAYUR AND
ANOTHER
v.
MITHIBAI

son or daughter (unless it be held that she or he is provided for at all events under Section 5) which is that in the case to which Section 6 applies—viz., the intestate leaving a widow but no lineal descendants, a son or daughter's widow or widower would take nothing (as such widow or widower is not mentioned in Schedule 1 to the Act,) but in the case to which Section 7 applies—viz., the intestate dying, leaving neither lineal descendants nor a widow or widower, a son or daughter's widow or widower will take a share in the order provided in the 2nd schedule. I am unable to see any relevance, where an intestate leaves no lineal descendants, of the circumstance that he or she left a widow or widower, to the question whether the widow or widower of a predeceased son or daughter is to take or not. To make the Act harmonious, amendments are, in my opinion, necessary in several respects; but I am of opinion that, in the present case, the difficulties in the way of the construction contended for on behalf of Awabai are much less than those in the way of the construction adverse to her claim. The report of the Commissioner must be amended by certifying that Awabai, widow of Naserwanji Kavasji, is entitled to a share in the estate of the intestate, such share being one moiety of the share which her deceased husband Naserwanji would have taken had he died immediately after the intestate, and that the other moiety of the share of the said Naserwanji has devolved, under Section 6, on his brothers and sisters⁽¹⁾, viz., Mancherji, Dorabji, and Serinbai, Dhunbai, Jerbai, and the posthumous daughter of the intestate by Mithibai, and on the children of his brother Kharsedji. I am of opinion that the costs of arguing the objection should come out of the estate.

(1) Note.—This question was not argued.

[ORIGINAL CIVIL JURISDICTION.]

THE SECRETARY OF STATE FOR INDIA (PLAINTIFF) v. SIR
ALBERT SASSOON AND OTHERS (DEFENDANTS)*

1877.
February
20.

Land reclaimed from the sea.

The plaintiff demised to the defendants for a term of 999 years certain lands, a portion of which, A, was liable to an annual rent of Rs 500 per acre. For the other portion, B, which was described in the lease as "being at times covered by the sea," a nominal rent of Re. 1 per acre per annum was reserved. The lease contained a power to the lessees "to reclaim from the sea" the whole or any portion of B, and provided that upon such reclamation the lessees should pay for any portion of B which they might "reclaim from the sea" an enhanced rent at the rate of Rs 500 per acre per annum. The lessees also had power under their lease to dig or excavate any portion of the demised lands, and to remove the soil therefrom. The lessees thereupon excavated a portion of B, and thus turned it into a dock, at the entrance of which they constructed gates, by means of which they could in a measure, but not entirely, control the flow of sea water into the dock. The defendants charged nothing for the use of the dock, but for the use of the wharves round it they charged a fee.

Held that the expression "to reclaim from the sea" signifying in its primary and ordinary sense the conversion of the reclaimed land into dry land, by rendering it secure from the ingress of the sea, with the view to its being used as such, the construction of the dock was not such a reclamation as was contemplated in the lease, and, therefore, the enhanced rent of Rs. 500 per acre could not be charged for the water area of the dock.

THIS was a special case stated for the opinion of the Court under the provisions of Section 328 of Act VIII. of 1859, and the parties consenting that it should be heard by two Judges in the first instance, it was considered by SARGENT and GREEN, JJ.

The following was the case stated:—

1. By an indenture of lease bearing date 7th November 1870, and expressed to be made between the Secretary of State for India in Council (hereinafter called the lessor) of the one part and the Honourable Sir Albert Abdulla David Sassoon, Knight, C S I., Reuben David Sassoon, Arthur Sassoon, and Aaron Moses Gubbay (hereinafter called the lessees) of the other part, the lessor granted and demised to the lessees and their assigns all that piece of land situate at Colaba, in the Island of Bombay, containing by admeasurement 76,090 square yards, bounded on the north by the public road leading from the Fort to the Light-

1877. house, on the south by the sea, on the east in part by a road in other part by the Victoria Basin, and on the west in part by ground belonging to Government and in other part by the sea, which piece of land was shown on the plan drawn in the margin of the said indenture, and was therein coloured pink, and was marked A and B, the part marked B being then at times covered by the sea, together with (among other things) the right to reclaim from the sea all and so much of the said premises as was then at times covered by the sea, to have and to hold the said premises thereby granted and demised unto the lessees and their assigns for the term of 999 years, from 27th June 1870, yielding and paying therefor yearly during the said term for the portion of the said piece of ground, marked A, Rs. 3,750, being at the rate of Rs. 500 per acre, and for the remaining portion of the said ground, marked B, until some portion thereof should have been reclaimed from the sea, a yearly rent calculated at the rate of Re 1 per acre, and from and after any portion of the said ground, marked B, should have been reclaimed from the sea until the whole thereof should have been so reclaimed, a yearly rent calculated at the rate of Rs 500 per acre for so much of the said ground marked B as should for the time being be reclaimed from the sea, and Re. 1 per acre for the unreclaimed portion thereof, and from and after the whole of the said ground marked B should have been so reclaimed, the yearly rent of Rs. 7,857, being at the aforesaid rate of Rs 500 per acre.

THE SECRETARY OF
STATE FOR
INDIA
v
SIR ALBERT
SASSOON.

2. Since the date of the said indenture of lease, the lessees have excavated a portion of the ground marked B, and have converted the portion so excavated into a dock, known as the Sassoon Dock, and they have raised the remaining portion of the said ground, and have converted the portion so raised into wharves and bunders. The said dock was completed on 8th April 1875. At the time the said indenture was executed it was not in the contemplation of the parties to this case that upon the premises thereby demised a dock should be constructed, and in fact such dock was not designed or commenced until the year

and 6 steam pumps were continually employed for the purpose of keeping such site free from water. But it was not found possible entirely to exclude the sea from the said site during the construction of the said dock.

1877
THE SECRETARY
TO THE GOVERNMENT
OF THE BOMBAY
PRESIDENCY
INDIA
v
SIR ALB
SASSOON

5. Since the completion of the said dock it has been filled with water entering from the sea. The present floor of the said dock has been excavated by the lessees to a depth of from 9 feet to 10 feet or thereabouts lower than the depth of the Victoria Basin, and is from 8 feet to 9 feet or thereabouts below the level of low water at spring tides, and from 11 feet to 12 feet or thereabouts below the level of low water at neap tides.

6. At the entrance of the said dock are single lock-gates opening inwards. When the said dock is not being used for vessels the said lock-gates are left open. When the said dock is being used for vessels, the said lock-gates are usually kept closed, but they are necessarily opened when any vessel enters or leaves the said dock. The mechanical contrivances employed by the lessees in the construction of the said lock-gates enable them at will either to open the same or to keep the same closed, unless the water outside the said gates rises to a level higher than that of the water within the dock, when the said gates are obliged to be kept open, and this occurs during a period of 5 or 6 days twice during every month. During a portion of the S. W. monsoon the said lock-gates are left continually open, as sea-going vessels do not enter the said dock at that season of the year.

7. When the said lock-gates are closed, the said dock forms an enclosed basin of water wherein vessels can at all periods of the tide lay alongside the Sassoon Dock wharf and discharge their cargoes. If the said lock-gates were not so closed, sea-going vessels could not, save at high tide, lay alongside the said wharf and discharge their cargoes as aforesaid.

8. It is competent to the said lessees to make charges for the user of the dock by ships; but such charges have never yet been made, nor is it at all probable that such charges ever will be levied, as the said lessees have satisfied themselves that ships would refuse to enter or use the said dock if subjected to any payment for the use of the same.

1877 9. A tariff of import and export charges is levied by the
 THE SECRETARY OF STATE FOR INDIA lessees upon all goods landed and shipped at the said wharf.
 SIR ALBERT SASSOON. 10. It would not be possible to lay dry the said dock except
 by filling up the entrance thereto and employing powerful steam
 pumping machinery, and the said dock when so laid dry would
 be useless as a dock.

11. The lessees admit that they are now liable to pay rent for the whole of the premises demised by the said indenture of lease other than the 3 acres 3,927 square yards occupied by the said dock at the rate of Rs. 500 per acre.

12. The question for the opinion of this Honourable Court is, whether the lessees are liable to pay rent for the 3 acres 3,927 square yards portion of the said demised premises occupied by the said dock, at the rate of Rs. 500 per acre, or at the rate of Re. 1 per acre.

13. It is agreed that if this Honourable Court shall decide that the lessees are liable to pay rent for the portion of the said demised premises occupied by the said dock at the rate of Rs. 500 per acre, the lessees shall pay such rent to the lessor, and that the first payment thereof shall be considered to have accrued due on the 8th April 1876.

14. It is further agreed that the costs of this case and application shall be in the discretion of this Honourable Court.

Marriott, Advocate-General (Acting) and *Macpherson* for the plaintiff:—At the time of the execution of the lease, no doubt the parties did not contemplate the construction of this dock, but what they did contemplate was that the lessees should interfere with the unrestricted flow of sea water over B in such a way as to render B profitable to themselves, and that then they were to pay the higher rent. By means of the dock-gates the lessees have complete control over the influx and reflux of sea water over , except for a period of five days twice in the month, when owing to the high tides the water outside rises to a higher level than the water can be raised inside when the gates are shut; at such times, therefore, the gates must be opened, but this does not interfere

quantity of water to enable vessels to float there. No doubt, it would not be possible to lay dry the dock, except by filling up the entrance and pumping out the water ; but to do this would be to render it useless as a dock. It is true, the dock never is and never has been quite dry ; but the sea water in it is a part of the reclamation, it is used by the defendants, and under their control.

1877
THE SECRETARY OF
STATE FOR
INDIA
v.
SIR ALDER
SASSOON.

Latham and Inverarity for the defendants:—Reclaimed ground is throughout the lease contrasted with ground at times covered by the sea. To reclaim here must mean to convert permanently into dry land. If the lessees admitted the sea purely at their own will and for their own purposes, still the land could not be said to be reclaimed from the sea. The sea, so far as it was made to subserve the purposes of the lessees, might be said to be reclaimed, but this would not be a reclamation of the land, and it is in the case of reclamation of the land that the enhanced rent is to be paid. Moreover, the lessees have not gained complete dominion over the sea either within the dock or without it. The dock is, in fact, nothing more than an arm of the sea, with which the lessees have not interfered, except to deepen it by excavating its bed, and this they had power to do under the lease. It is only reasonable to suppose that it was intended that the enhanced rent should be paid only in respect of such portions of B as by being converted permanently into dry land were made directly profitable to the lessees. They derived, however, no direct profit from the dock, only from the wharves and bunders round it, for which they pay the enhanced rent.

[SARGENT, J. :—The wharves would not be profitable without the dock. You brought about the state of things by which alone your wharves are profitable. Ought you not to pay the higher rent for the dock ?]

No. *The Newport Local Board of Health v. The Newport Dock* ⁽¹⁾ shows that, though both parts of B may be used together as a commercial concern, they must be considered separately for purposes of rating, the wharves being considered dry land, and the dock land covered with water.

1877
THE SECRETARY OF
STATE FOR
INDIA
v
SIR ALBERT
SASSOON

There is no legal decision as to the meaning of the expression "to reclaim land from the sea" Johnson, Richardson, and Webster, in their dictionaries, seem to ascribe to the word "reclaim" a sense of recovering a thing to its former state. The word "reclaim" as applied to land seems to be of modern origin, for it does not occur in the Bedford Level Act (15 Car. II., c. 17), and the two great instances in Europe of reclamation of land from the sea, viz., the Bedford Level and the reclamations in Holland, were undoubtedly instances of winning back from the sea the dry land on which it had encroached. This shows that if the word "reclaim" be applied to land which never was dry land it ought at any rate to be understood as meaning the conversion of such land into premanently dry land.

Marriott, in reply :—The word "reclaim" cannot in the present instance have been used in the sense of restoring to a former state, nor does the word necessarily imply any such meaning, e.g., in such an expression as "to reclaim a wild animal," or as Dryden uses the word when he speaks of reclaiming in ranks the forest trees." The water area of the dock may be said to be reclaimed; *Peto v. West Ham Overseers*.⁽¹⁾ The word "reclaim" means merely to reduce a thing to the state desired. To make a salt-water basin or a swimming-bath would be to reclaim. It is not necessary that to reclaim from the sea there should be complete control over the sea. To subject land now under the complete dominion of the sea to such conditions as did not before exist to such an extent as to make it subservient to the use of man is to reclaim that land from the sea.

SARGENT, J., delivered the opinion of the Court. After reading the case stated, His Lordship continued—

It appears from this statement of facts that the demised premises consisted of two portions marked in the plan annexed to the lease A and B, on the first of which an annual rent Rs. 500 per acre was reserved, whilst on the latter, described as "being at times covered by the sea," a purely nominal annual rent of one rupee per acre was reserved—power however being given to the lessees to reclaim the same or any part thereof from the sea—in

which case an enhanced annual rent of Rs. 500 per acre was reserved on the lands so reclaimed. The question, therefore, whether the site of the dock, which is admittedly a portion of the demised premises marked "B," is liable to pay the enhanced rent of Rs. 500 or the originally reserved rent of one rupee per acre, must depend upon the answer to be given to the question, whether or no it has been reclaimed from the sea within the meaning of the lease? It was contended for the lessees that the ordinary meaning of the expression, "to reclaim land from the sea," is to convert land which is subject to be overflowed by the sea into dry land, by rendering it secure against the inroads of the sea; but, that even if it were capable of receiving another meaning, the language of the lease, and more especially of the power given to the lessees to reclaim the lands marked "B," shows that such was the exclusive sense in which the parties intended to use it, and, therefore, that the sea never having been expelled from the land in question except temporarily and very imperfectly, and that, too, only for the purpose of excavating the land and removing the materials, for which express power is given by the lease, and the land being still liable at times to be overflowed by the sea, it cannot be regarded as land "recovered from the sea." On the other hand, it was agreed for the lessor that "to reclaim from the sea" does not necessarily mean to secure the land from the inroads of the sea, so that it shall be converted into dry land, but that it includes the creation of a state of things (such as it was said now exists with respect to the land in question) by which the ingress of the sea is so controlled and regulated, and takes place under such conditions, that the land, albeit still liable to be overflowed at times by the sea, can, nevertheless, be applied to a useful mercantile purpose. Regarded as a mere question of propriety of language, we cannot doubt that the expression might be used with perfect correctness in either of the senses contended for. The land in the latter case would be reclaimed from the sea in the figurative sense of being released from its absolute dominion and power, as a man is said to be reclaimed from the dominion of evil habits. Again by the new condition of things, the land would be reduced to a "state desired," one of the senses ascribed to the verb "reclaim" in the dictionaries of Johnson and Webster, "the state desired" being, as was said in this case, one

1877

THE SECRETARY OF
STATE FOR
INDIA

"
SIR ALBERT
SASSOON.

1877 of great utility to man. But although there may, etymologically
 THE SECRETARY OF STATE FOR INDIA v. SIR ALBERT SASSOON. be no impropriety in the use of the expression in the sense contended for by the lessor, we entertain no doubt that in its primary and ordinary senses it signifies, as contracted by the lessees, conversion of the land into dry land by rendering it secure from the ingress of the sea with the view to its being used as such. Now it is possible, and indeed not improbable, that had it been contemplated at the time of the preparation of the lease that the land marked B might be dealt with as has actually taken place (which, however, by the agreement is admitted not to have been the case), that event would have been provided for : but as it is, we can only seek to discover the intention of the parties from all parts of the deed. In *Bland v. Crouley* ⁽¹⁾ Parke, B., says, under somewhat similar circumstances,—“The question in this case is as to the true construction of a deed, which was prepared apparently in the confidence that, if the Bill for making the direct Portsmouth railway passed into a law, the promoters would certainly carry the undertaking into effect. Had the parties contemplated the possibility that after the Bill pass, the railway would have been abandoned, it is probable that a distinct provision would have been made for that event, leaving no doubt whatever as to the true intention of the contracting parties. As the deed is framed, some doubt may be entertained as to what the parties would have stipulated if the present state of facts had been presented for their consideration. But all we have now to do is to ascertain the meaning of the words they have actually used ; and in construing the deed we must adopt the established rule of construction, to read the words in their ordinary and grammatical sense, and to give them effect, unless such a construction would lead to some absurdity or inconvenience, or would be plainly repugnant to the intention of the parties, to be collected from other parts of the deed.” Now it may be said that the circumstance of only a nominal rent of one rupee being reserved until the land should be reclaimed is of itself sufficient reason for giving the expression, “reclaim from the sea,” a liberal interpretation. This, however, appears to us to be a consideration not entitled to much weight, for it is quite possible that the inducement to the lessees to pay the very high rent

the lands marked B at only one rupee per acre, and the possibility of their being able to utilize them, under the powers given by the lease, at a merely nominal rent, provided they did not actually reclaim them from the sea and add them to the neighbouring *terra firma* included in the portion A. On the other hand, the following considerations are important as showing that the parties intended to use the expression exclusively in its ordinary sense:—1. The lease demises, “all the piece of land shown in the plan drawn in the margin of the deed and marked A and B, the part thereof marked B being at present at times covered with the sea, together with wharfage and tonnage rights and dues on the usual conditions, and also the right to reclaim from the sea all and so much of the said premises as is now at times covered by the sea.” These words taken in their plain and obvious sense appear to us, as was strongly contended for the lessees, to contrast throughout lands covered at times by the sea with those which are not so subject, and to anticipate the possibility of all or part of the lands so subject to be covered being brought into the same state as the more highly favoured portion of the demised piece of land. It was said, indeed, that the words covered with the sea in the description of the portion B only state an existing fact, but that the same words in the power to reclaim must be taken to express not only the fact of the land being covered by the sea, but also the idea of its being so at its free will and pleasure, but this would be to give a figurative meaning to the plain language of a formal technical instrument. 2. This deduction from the language of the operative part of the lease derives corroboration from the plan annexed to the lease, and which, by the ruling in *Lyle v. Richards*,⁽¹⁾ this Court is bound to look at as being part of the deed. In the margin the lands marked A are described as “reclaimed ground” and containing A7—2,410 square yards, and the land marked B “unreclaimed ground,” and containing A8—1,080 square yards: total 15 acres 3,490 square yards. 3. The circumstance that the higher annual rent of Rs. 500 per acre is reserved from the time the land or any part is reclaimed until the end of the term of 999 years, and that no provision is made

(1) L. R. 1 Eng. and Ir. Ap. 222; S. C. 35 L. J. Q. B. 214; 12 Jur. N. S. 947; 15 L. T. N. S. I.

1877.
THE SECRETARY OF
STATE FOR
INDIA
“
SIR ALBERT
SASSOON.

1877. for the land ceasing to be used as reclaimed land, shows that the parties contemplated a reclamation of a permanent nature, such as can scarcely be ascribed to a wet dock, which loses the reclaimed condition attributed to it by the lessors by the simple removal of the gates. 4. Lastly, if the ordinary sense of the language of the lease be once departed from, it becomes little more than a question of degree, and opens the door to a variety of modes of using the land for which it would be unreasonable to suppose that the parties could have contemplated the same enhanced rent being paid. Thus, if the test be the controlling the overflow of the sea and bringing it under such conditions that the land can be turned to a useful purpose: a wet dock such as has been constructed, a basin for country boats, a break-water with the adjacent lands deepened so as to admit of even larger vessels lying secure under the protection of the break-water and landing their cargoes, and, lastly, a public swimming-bath, would all more or less satisfy the necessary condition, and yet the expected profit to be derived from such different and temporary forms of reclamation would vary within very considerable limits. On the other hand, land permanently reclaimed from the sea and converted into dry land might fairly be charged with the payment of the same rent as the adjoining lands marked A. Upon the whole of the case submitted to us, we think that the lessees in dealing with the portion B of the demised premises as therein stated have not, as to so much thereof as forms the site of the dock, reclaimed it within the meaning of the lease, and must, therefore, declare that the land constituting the dock area coloured green in the plan annexed to the agreement is only liable to pay a rent at the rate of one rupee per acre per annum, and not, as contended by the plaintiff, at the enhanced rate of Rs. 500 per acre per annum. As the question turns upon the interpretation of a document to which both were parties, and which might, at the instance of either party, have been worded so as to exclude all doubt, we think that each party should bear his own costs.

THE SECRETARY OF
STATE FOR
INDIA
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SIR ALBERT
BASSOON.

[APPELLATE CIVIL JURISDICTION.]

RAVJI NARAYAN MANDLIK (PLAINTIFF AND APPELLANT) v. DADAJI BAPUJI DESAI, MĀVLATDĀR OF RATNĀGIRI (DEFENDANT AND RESPONDENT) * 1875. *September 5*

Act XXIII of 1871, Sections 3, 4, and 6—Construction of a sanad—Ownership in the soil.

Though as stated in *Krishnarav v. Rangrav* (4 Bom. H. C. Rep. 1, A. C. J.) “*sanad* grants in *inām*, *sarvanjam*, &c, are, generally speaking, more properly described as alienations of the royal share in the produce of the land (*i.e.*, of land revenue) than grants of land, although in popular parlance occasionally so called,” yet such is not invariably the case.

If words are employed in a grant which expressly, or by necessary implication, indicate that Government intends that so far as it may have any ownership in the soil, that ownership shall pass to the grantee, neither Government nor any person subsequently to the date of the grant deriving under Government can be permitted to say that the ownership did not so pass, unless there are in the grant such detailed provisions as show that such words are limited in their operation.

An enactment of a character so arbitrary as Act XXIII of 1871 ought to be construed strictly, and the Courts should not extend its operation further than the language of the Legislature requires.

The meaning of the expression “grant of money or land revenue” extended by Section 3 of Act XXIII of 1871 to include “anything payable on the part of Government in respect of any right, privilege, perquisite or office” is not of so wide a range as to include a grant of the proprietorship of the soil, or any suit involving the rights of a proprietor of the soil.

Krishnarav v. Rangrav (4 Bom. H. C. Rep. 1, A. C. J.), and *Vaman Janardhan v. Collector of Thana* (6 Bom. H. C. Rep. 191, A. C. J.), and *Ruttonji Edulji v. Collector of Thana* (11 Moore I. A. 295) distinguished.

A *sanad* by the State purporting to grant a village in *inām*, “including the waters, the trees, the stones and quarries, the mines, and the hidden treasures, but excluding the *Hakdārs* and *Ināmdārs*.”

Held to be a grant by the State of such proprietary right as it had in the soil of the village to the grantee.

It is not open to the grantor to say that such words as the above mean nothing but land revenue.

The saving of the rights of the *Hakdārs* and *Ināmdārs* does not prevent the property in the soil, so far as it can be regarded as vested in Government, from passing to the grantee.

THIS was a special appeal from the decision of R. W. Hunter, District Judge at Ratnāgiri, reversing the decree of E. T. Candy, Extra Assistant Judge of the same District.

* Special Appeal No. 507 of 1873.

1875. The plaintiff sued, in the Court of the Assistant Judge, as proprietor of a moiety of the village of Nanej, to recover from the Mámlatdár a moiety of the land rents for 1870-71, which the plaintiff alleged had been wrongfully intercepted and withheld by the Mámlatdár. The Assistant Judge awarded the plaintiff's claim in part, but his decree was reversed by the District Judge, who held on appeal that the suit was one relating to a grant of land revenue, and was barred by Section 6 of Act XXIII of 1871.

RÁVJI
NÁRÁYAN
MANDLIK
v.
DADÁJI BÁ-
PUJI DESAI.

The plaintiff based his claim on a *sanad*, granted by the Raja of Satara to an ancestor of the plaintiff, the material portions of which were as follows:—

“In the Sur year 1134 (A.D. 1733-34).

“Whereas you came into the presence of our liege the Maharajah Chatrapati and our venerable father the Rav Pratinidhi at Camp Satara, and made a representation to the effect that you were an old and loyal servant of the State, but were unable to maintain your family, and that if our liege would be pleased graciously to grant a whole village in *inám* and continue the same, you would enjoy the same, and protect your family, and wish well to the State, and remain in peace. Therefore it was ordered that a village should be granted to you in *inám*. Accordingly the whole of the village of Mouze Nanej in Tarple Hat Khambe in Subha and Prant Rájápur is granted in *inám*, including the waters, the trees, the stones (including quarries), the mines, and the hidden treasures therein, but excluding the *Hakdárs* and *Inámdárs*. Do you, therefore, enjoy the same through your sons and grandsons, &c., from generation to generation, and remain in peace.

The 5th Zalkad.

Ordered by the Huzur.”

A letter, of even date with the *sanad*, was at the same time written by the same officer to the present and future *Deshavikaris* and *Deshlekhs* of Subha and Prant Rájápur, which after informing them of the grant of the *sanad* to Visaji Rav Mandlik and of the circumstances under which it had been made, proceeded

"Accordingly the whole of the village of Mouze Nanej in Tarple Hat Khambe in Prant aforesaid is granted in *inam*, including the waters, the trees, the stones (including quarries), the mines, and the hidden treasures therein, and present *pattis* and future *pattis*, but excluding the *Mahdárs*. Do you, therefore, continue the same to him and his sons and grandsons, &c., from generation to generation. You should not insist upon having a fresh letter every year. You should take a copy of this letter, and return this original letter to the aforesaid as a document of title. Be this known.

1875.

RÁVJI
NÁRÁYAN
MANDLIK
v.
DÁDÁJI BÁ-
PUJI DESAI.

The 5th Zalkad.

Registered."

The special appeal was heard by WESTROPP, C.J., and LARPENT, J.

Shamrav Vithal for the appellant:—The District Judge was wrong in holding the claim barred by Act XXIII. of 1870. That Act does not apply to the present case. The terms of the *sanad* distinctly show that what was granted was not merely land revenue as held by the Courts below, but the absolute ownership of the land. This is clear from the use of the words, "including the waters, trees, stones (or quarries), mines, and hidden treasures." The case of *Vaman v. The Collector of Thana*,⁽¹⁾ relied upon by the Lower Court, strongly supports this view, as will appear from pages 199 and 200. Act XXIII. of 1871 bars only suits "relating to any pension or grant of money or land revenue conferred or made by the British or any former Government" The learned pleader also referred to *Shahsadee Hazara Begum v The Collector of Burdwan*.⁽²⁾

Dhirajlal Mathuradas (Government Pleader), for the respondent, argued on the wording of Section 4 of the Pensions Act, and relied upon *Krishnarav Ganesh v. Rangrav*.⁽³⁾

The judgment of the Court was delivered by

WESTROPP, C.J.:—This action was brought by the plaintiff as proprietor of a moiety of the village of Nanej, to recover from the

(1) 6 Bom. H. C. Rep. 191, A. C. J. (2) 23 Calc. W. R. 378, CIV. RUL.

(3) 4 Bom. H. C. Rep. 1, A. C. J.

1875 Mámíatdár the plaintiff's half of the land rents for the year 1870-71, wrongfully, as the plaintiff alleges, intercepted and withheld by the Mámíatdár.

RÁVJI
NÁRÁYAN
MANDLIK

v
DÁDÁJI BÁ-
PUJI DESAI

The Assistant Judge, who tried the suit, awarded a part of the claim; but the District Judge, on appeal, reversed this decision on the ground that the suit related to a grant of land revenue and, as such, was, for want of the certificate required by Act XXIII. of 1871, barred by Section 6 of that Act.

The only question therefore, before us is whether Act XXIII. of 1871 operates so as to deprive the Ordinary Civil Courts of jurisdiction in a suit brought under such circumstances as present themselves here.

The *sanad*, whereby the village (or perhaps we should rather say so much of it as belonged to the Satara Government) was granted to Visaji Rav Mandlik, the ancestor of the plaintiff (special appellant), has not now for the first time run the gauntlet of the British Civil Courts. Its genuineness appears to have been not very reasonably disputed by the Collector of Ratnágiri upwards of twenty years ago, but to have been completely established in the Zillah Court whose decision was (A D. 1853) affirmed in the Sadar Adalat ⁽¹⁾ [His Lordship then, after reading the *sanad* and the portion of the *tahid*, or letter of even date with it set out above, proceeded]:—

The District Judge, while admitting that at first sight the terms of this grant convey an absolute proprietorship in the village, has held that the grant is limited by the rights which are reserved by the words “excluding the *Hakdárs* and *Inamdárs*,” or, as he has paraphrased those words, “saving the rights of the *Hakdárs* and *Inamdárs*.” From the evidence on the record the learned Judge came to the conclusion that all that the grantee had enjoyed since the date of the grant was a half share in the revenue of the village, and that, notwithstanding the apparently more comprehensive language of the grant, it really was a grant of land revenue and nothing more.

(1) *The Collector of Ratnágiri v. Naro Dhondeo*, Morr. S. D. A. Rep., 1853,

We would observe, with regard to this finding and the additional (the fifth) point raised in the special appeal, viz. : "that the District Judge was in error in not permitting the special appellant to produce evidence in support of the facts stated in his dakhast, Exhibit No. 7," that the question as to what rights the plaintiff and his ancestors had actually enjoyed in the village was raised for the first time in the Lower Appellate Court, and assuming with the learned District Judge that it was necessary to enter into that question, we think that he should, before deciding it, have admitted the application (Exhibit 7) made by the plaintiff to be allowed to give evidence on the point.

We are, however, of opinion that such an inquiry was unnecessary, inasmuch as the determination of the nature of the claim and title of the plaintiff must rest upon the terms of the grant, irrespectively of the use which the plaintiff and his ancestors may have made of the property conveyed by it.

It is no doubt true that "*sanad* grants in *mām*, *saranyam*, &c, are, *generally speaking*, more properly described as alienations of the royal share in the produce of the land, *i.e.*, of land revenue, than grants of land although in popular parlance so called,"⁽¹⁾ but it is not true that such is invariably the case. If words are employed in the grant, which expressly or by necessary implication indicate that Government intends that, so far as it may have any ownership in the soil, that ownership shall pass to the grantee, neither Government, nor any person subsequently to the date of the grant deriving under Government, can be permitted to say that the ownership did not so pass. Now in the *sanad* in evidence here, whosoever framed it, it was apparently determined that no ambiguity should exist as to what the force of the term "village" might be, and, in order to be explicit, he added to the grant of the village in *mām* the words "including the waters, the trees, the stones (including quarries), the mines, and the hidden treasures therein." The Assistant Judge has relied upon the case of *Vaman Janardhan Joshi v. The Collector of Thana and the Conservator of Forests* ⁽²⁾ as supporting his opinion that the *sanad* did not grant the soil. But a more careful perusal of

1875

RÁVÍ
NARÁYAN
MANDLIK
v
DÁDÁJI BĀ-
PUJI DESAI.

(1) 4 Bom. H. C. Rep 7, A. C. J. (2) 6 Bom H. C. Rep. 191, A. C. J.

1875. that case would have shown to him that the actual decision in that case was wholly inapplicable to the present case, inasmuch as there were not any such words employed there as "the waters, the trees, the stones, the mines," &c., which we have here, and which, if they do not mean that the Government of the years 1783-84 did intend that the soil, so far as it could be regarded as vested in that Government, should pass, it is impossible to say what they do mean, and he would also have found on perusing pages 199 and 200 of the judgment of Mr. Justice Melvill in that case, that the result of it would have been the opposite of what it was if the *sanad* there had contained such words.

RÁVJI
NARAYAN
MANDLIK
v
DÁDÁJI BÁ-
PUJI DESAI.

There may, of course, be, as there were in the *kaul* in the case of *Ruttonji Edulji v. The Collector of Thana and the Conservator of Forests*,⁽¹⁾ such detailed provisions as may show that words, such as we have here, may be limited in their operation. The description of the lands there actually demised, and which did pass under the terms of the *kaul* or lease, was so clear and detailed that it was held not to include forest lands.

Whatsoever rights (if any) in the village of Nanaj *Hahdars* or *Inámdars* (it is unnecessary for us to give any opinion now as to whether the *Khote* could come within either of those denominations) may have had, as against the State, at the date of the *sanad*, have, no doubt, been saved to them, and even if they had not been expressly named in the *sanad*, would have remained intact, inasmuch as Government could not have granted away the rights of third parties. This is in accordance with the opinion lately expressed in giving the judgment in the Kanara Land Revenue Case⁽²⁾ with respect to the rights of *raiya*s holding a proprietary interest in lands. But it is not for the State itself to say that, when, beside granting "a village," which may possibly mean only the land revenue thereof, it also purports to grant the waters, trees, stones (or quarries), mines, and the concealed treasures, all of these words mean nothing but land revenue. Could it be for a moment contended that the British Government, which, so far as the plaintiff's moiety of the village is concerned,

(1) 11 Moore's Ind. App. 295; S. C. 10 Cal. W. R. 13 P. C.

(2) *Yakuntá Bapuji v. The Government of Bombay*, 12 Bom. H. C. Rep.

has succeeded only to the territorial sovereign rights of the Raja of Satara through the Peishwá, could establish as against the plaintiff that the right to mines in the plaintiff's moiety of the village still remains vested in the Crown? Such a contention could not be maintained. The same remark would apply to each of the other items expressly named in the *sanad* as conferred upon the plaintiff's ancestor, and those items are all indicative of an intention that the soil should pass.

1875

RÁVJI
NÁRÁYAN
MANDLIK
v
DÁDÁJI BÁ-
PUJI DESAI.

An enactment of a character so arbitrary as Act XXIII. of 1871, which purports to deprive the subject of his right to resort to the ordinary Courts of justice for relief in certain cases, ought to be construed strictly, and the Courts should not extend its operation further than the language of the Legislature requires. An instance of a recent refusal by the High Court of Calcutta to give it any such extended construction is the case of *Shah-zadee Hazara Begum v. The Collector of Burdwan*.⁽¹⁾ We do not mention that case as similar in its facts to those of the present case, but merely as showing that the Court was careful to keep the operation of the Act within its proper limits. The present suit is substantially one in which the plaintiff, in respect of his ancient ancestral estate in land, and not in respect of any mere grant of land revenue, complains of an interference with his rights as proprietor of half of the village of Nanej by the officer of the British Government which, as representing the Vishálgarh, claims the other moiety of the same village, and in pursuance of which interference the Mámlatdár has collected rents which belong to and issue forth from the estate of the plaintiff as proprietor, and which rents in the Mámlatdár's hands, the plaintiff alleges, are moneys had and received to his use, which he contends the Mámlatdár had not any right either to receive or detain.

The Act (XXIII. of 1871) is intitled "An Act to consolidate and amend the law relating to pensions and grants by Government of money and land revenue." Section 4 lays down that, "except as hereinafter provided, no Civil Court shall entertain any suit relating to a pension or grant of money or land revenue conferred or made by the British or any former Government."

(1) 23 Calc. W. R. 378, Civ. Rul.

1875 And, besides its ordinary meaning, the expression "grant of money or land revenue" is declared by Section 3 to include "any thing payable on the part of Government in respect of any right, privilege, perquisite, or office."

RÁVJI
NÁRÁYAN
MANDLIK
v.
DADÁJI BÁ-
PUJI DESAI.

The meaning of the expression "grant of money or land revenue," although thus expressly extended by the glossary of the Act, is not of so wide a range as to include a grant of the proprietorship of the soil or any suit involving the rights of a proprietor of the soil.⁽¹⁾ The existence of this class of grants was known to the Legislature, and suits relating to such proprietary rights would, we doubt not, have been expressly mentioned had it been intended that the Act should apply to them. We cannot suppose that the Indian Legislature contemplated the enactment of a measure of a scope so wide as, on behalf of the Mámlatdár, it has been contended belongs to this Act.

With respect to the saving, in the *sanad*, of the rights of *Hakdárs* and *Inámdárs*, we would refer to *Vasudev Pandit v. The Collector of Poona*,⁽²⁾ where such an exception was held not to prevent the property in the soil, so far as it could be regarded as having been vested in Government, from passing to the *Inámdár*. The judgment of the Court there rested not directly upon the *sanad* granting the *inám*, but upon the construction of a decision of the *Inám* Commissioner (under Act XI. of 1852 and especially Rule I. of Schedule B. of that Act) upon the *sanad*. He had ruled that "the whole of the village of Vadgaum, excepting only the rights and privileges of ancient *Hakdárs* and *Inámdárs*, should be continued in *inám* to the male descendants of Bhau Maharaz," and his order purported to be made under Schedule B., Rule I. of Act XI. of 1852, which is conversant of the continuance to subjects of "lands" hereditary or in perpetuity exempt, wholly or partially, from the payment of revenue; and under that decision of the *Inám* Commissioner, West and Nánábhái Haridás, JJ., held that the proprietorship in the soil must be regarded as vested in the *Inám*-

(1) As to the restriction of the word "right" in Sec. 3, see *Parbhudas v. Motiram*, I. L. R., 1 Bom. 203.

(2) 10 Bom. H. C. Rep. 471.

dār, and that the Collector had no right to open a quarry in, and take stone and sand from, the lands.

1875

RÁVJI
NÁRÁYAN
MANDLIK
v.
DÁNÁJI BÁ-
RUJI DESAI.

We reverse the decree of the District Judge, and remand this cause for a new trial on the merits by the District Judge. We refrain from expressing any opinion on the question as to the right of Government to introduce the Revenue Survey into the village of Nanrej, or to attach the plaintiff's half of that village, or, in short, upon any point in the cause, except the question whether Act XXIII of 1871 is applicable to this suit, the District Judge not having dealt with any other question. The objection founded on Act XXIII of 1871 to the jurisdiction of the Civil Court was not made on behalf of the *Mámlatdār* in the Court of the Assistant Judge, and, as we think, ought never to have been made. We accordingly direct the defendant to pay to the plaintiff the costs of both appeals. The costs of the suit must be disposed of, as may be just, on the re-trial now ordered.

[APPELLATE CIVIL JURISDICTION.]

GURUSHIDGAVDÁ BIN RUDRAGAVDÁ (PLAINTIFF AND APPELLANT)
v. RUDRAGAVDATI KOM DYAMANGAVDÁ AND OTHERS (DEFEND-
ANTS AND RESPONDENTS).*

1877
February 7.

Act No. XXIII of 1871, Sections 3, 4, and 6—Suit for a declaration of plaintiff's right to officiate as patil.

A suit for a declaration of the plaintiff's eligibility to officiate as patil of a village is not prohibited by Act XXIII of 1871. That Act should receive a strict construction, as being in derogation of the right of the subject to resort to the ordinary Civil Courts.

Babaji v. Rajaram (I. L. R. 1 Bom. 75) distinguished.

THIS was a special appeal from the decision of G. Druitt, Assistant Judge at Dhárwár, reversing the decree of A. M. Cantem, 1st Class Subordinate Judge at the same place.

The plaintiff Gurushidgavdá brought this suit to obtain a declaration of his right to officiate by rotation as patil of the village of Lokur in the district of Dhárwár. The defendants denied his

* Special Appeal No. 362 of 1876.

1877

GURUSHID-
GAYDA BIN
RUDEA-
GAYDÁ
v
RUDEGAY-
DÁTI KOM
DYAMAN-
GAYDÁ.

right so to officiate. The Subordinate Judge on the evidence held the plaintiff's claim proved, and made a decree in his favour. In appeal the Assistant Judge reversed that decree, on a preliminary objection raised by himself, that the suit was not maintainable in a Civil Court. The following is an extract from his judgment:—

“Before hearing the case the Court raised the preliminary question,—whether the action was not barred by Act XXIII of 1871? On this point I find that the claim is barred. Respondent's vakil argued that this suit was for a declaration of a right to officiate only. He admitted, however, that there was a money allowance attached to the office of patil. This being the case, there can be no doubt, I think, that this is a suit relating to a grant of money within the terms of Section 4 of the Act, or, as is explained in Section 3, ‘anything payable on the part of Government in respect of an office.’ The suit is, therefore, barred; see *Babaji v. Rajaram* ⁽¹⁾ I reverse the decree and dismiss the suit.”

The special appeal was heard by WESTROPP, C. J., and NANABHAI HARIDAS, J.

Ghanasham Nilkant Nadharni for the appellant:—The Assistant Judge was wrong in applying the Pensions Act XXIII of 1871 to the present case. The suits barred by Section 4 of that Act from the cognizance of Civil Court are suits “relating to any pension or grant of money or land revenue.” The present is a suit for a declaration of the plaintiff's right to officiate as patil, and such a suit can be entertained and tried by a Civil Court: *Ningangavda v. Satyangavda*.⁽²⁾ The case *Babaji v. Rajaram*,⁽³⁾ relied upon by the Assistant Judge, clearly shows, that although a suit against a co-sharer to establish plaintiff's right to a portion of any allowance paid by Government is barred under the Pensions Act, without the certificate required by Section 6, yet a suit for a share in land bestowed by Government and enjoyed free of assessment does not come under the provisions of that Act. This appears more clearly from *Rarji Nardayan Mandlik v. The Mamlatdar of Ratnagiri*.⁽⁴⁾

Shamrav Vithal for the respondent.

WESTROPP, C. J.:—The Assistant Judge has misunderstood the case of *Babaji Hari v. Rajaram Ballal* ⁽¹⁾ to which he refers, and the nature of this suit. This suit does not seek to obtain “anything payable on the part of Government in respect of an office,” or even a declaration that the plaintiff is entitled to anything so payable, but seeks a declaration of the plaintiff’s eligibility to officiate as patil of Lokur. Such a suit is not prohibited by Act XXIII. of 1871, which, moreover, is an Act that should receive a strict construction as being in derogation of the right of the subject to resort to the ordinary Civil Courts: *Ravji Narayan Mandlik v. The Mamlatdar of Ratnagiri*. ⁽²⁾ It was only so far as the plaintiff in *Babaji Hari v. Rajaram Ballal* ⁽³⁾ sought a declaration that he was entitled to a share in allowances paid from the Government Treasury, that the High Court held that his Civil suit was affected by Act XXIII. of 1871. That suit was held to be sustainable so far as the *inam* lands were concerned. The right to officiate as an hereditary officer was not there in litigation. That case, therefore, is wholly inapplicable to the present case, in which the question of the plaintiff’s eligibility to officiate is alone in litigation,—a question which may be the subject of a Civil suit: *Ningangavda v. Satyangavda*. ⁽⁴⁾ See also the judgment of this Court in the matter of an application for review of judgment ⁽⁵⁾ and *Babaji v. Nana*. ⁽⁶⁾

We reverse the decree of the Assistant Judge and remand the cause for re-trial by the District Court on the merits. Costs of this special appeal to abide the result of the cause.

Note.—The following is the case referred to above as the matter of an application for review of judgment in Regular Appeal No. 72 of 1871*—

The plaintiff, Nindangavda, sued the defendants, Malangavda and the Collector of Kaladgi, to have it declared that the plaintiff was entitled to a

* This case establishes, 1st, that an admitted ownership of a share in the lands appurtenant to a *patilki vatan* leads to a *prima facie* presumption of eligibility for the office of *patil*, and, 2nd, that the exercise by the Collector of his right, under Act XI of 1843, to appoint one of several co-parceners to officiate as *patil* is not a denial of the eligibility of the others, and does not, therefore, give to the one so appointed a possession adverse to his co-parceners.

(1) I. L. R. 1 Bom. 75.

(2) *Supra* p. 523.

(3) I. L. R. 1 Bom. 75.

(4) 11 Bom. H. C. Rep. 232.

(5) Regular Appeal No. 72 of 1871, decided 16th November 1874, Printed Judgments of 1874, p. 205. Reported in the note *infra*.

1877.

GURUSHID-
GAVDA BIN
RUDRA-
GAVDA

v.
RUDRAGAV-
DATTI KOM
DYAMAN-
GAVDA

1872.

NINDAN-
GAVDA

v.
MALAN-
GAVDA.

1872.
 NINDAN-
 GAVDÁ
 v.
 MALAN-
 GAVDÁ.

half share in a certain *patilki vatan* and to officiate as *patil* in rotation with the defendant Malangavdá. This defendant denied the plaintiff's title, and pleaded limitation, contending that Laxmangavdá, his predecessor in office, had been appointed by the Collector to act for life, that this appointment gave to Laxmangavdá a possession adverse to the plaintiff and his ancestors, and that Laxmangavdá had died and had been succeeded by Malangavdá more than 12 years before the institution of this suit by the plaintiff. The Assistant Judge, Mr. Baker, found that the plaintiff was a half sharer in the *patilki vatan*, but had lost his right to officiate in turn with the defendant by lapse of time. On appeal to the High Court, LLOYD and KEMBALL, JJ., amended the decree of the Lower Court on 17th June 1872, holding that the plaintiff's suit was not barred by limitation, and that he had a right to officiate as *patil* in rotation with the defendant Malangavdá. The latter applied for a review of judgment, and the application was disposed of as follows, by WESTROFF, C. J., and KEMBALL, J., on 14th September 1872:—

It is true that it is stated in the judgment of the 17th June 1872, that as it lay upon the defendant to prove that Laxmangavdá's death occurred within 12 years of the commencement of the suit, and he had not done so, this suit is not barred against either of the defendants. If the date of Laxmangavdá's death were material to show that the suit was brought within twelve years from that event, we think that it would lie upon the plaintiff, and not on the defendant, to give such proof. But we do not think that time under the Limitation Act did begin to run from that event, or that the plaintiff's cause of action accrued either then or in 1852, when Laxmangavdá was nominated by the Collector as *patil* for life. The plaintiff, it is admitted, is an owner of a moiety of the lands appurtenant to the *patilki vatan*, and *primâ facie*, as such owner, we are inclined to think, would be entitled to officiate as *patil*, if his co-parceners chose to nominate him to that office, or if, on the parceners differing as to which of them should officiate, the Collector thought fit to exercise his power of selection under Act XI. of 1843 in favour of the plaintiff, when the voters cannot agree—in other words, the plaintiff, as such owner of a moiety of the lands appendant to the *vatan*, would be eligible for the office of *patil*. That presumption of eligibility grows into proof when accompanied, as it is here, by satisfactory evidence of an actual enjoyment of the office of *patil* for five years by the plaintiff's brother Yellangavdá from 1847 to 1852. In 1852, Laxmangavdá, on the expiration of Yellangavdá's appointed term of five years, was, on the parceners being unable to agree as to who should be the next officiator, appointed, under Act XI. of 1843, by the Collector to officiate for life. It is true that Laxmangavdá seems then to have put forward an apparently fabulous story as to his having been forced by duress to sign the nomination of Yellangavdá in 1847, but the fact, that Laxmangavdá then said so, does not make the exercise by the Collector of his power of selection in 1854 an act adverse to the plaintiff or his family, nor did it give them any cause of action. If we were to hold such an exercise of his right to select one amongst several

parceners as a denial of the eligibility of all of those whom he passes over, we should be giving to Act XI. of 1843 an effect never contemplated by the Legislature. Not until 1869 has it been proved that anything took place which had the effect of rendering the officiator's possession adverse to the plaintiff. Then the Collector, at the instigation of the defendant, would appear to have removed the plaintiff's name from the Government books as a sharer in the patilship, where it had, up to that time, stood. The suit has been brought promptly after that occurrence and is within time. For these reasons, we discharge the rule *nisi* for review with costs.

The following is the case of *Babaji v. Nana* referred to above†:—

Babaji sued Nana and others to have it declared that he was entitled to a one fourth share in a certain *patilki vatan*, alleging that his name had been removed by the Revenue authorities from the Government books, and that he had been referred by them to a civil suit to establish his right. The Subordinate Judge dismissed the suit on the ground that the plaintiff had shown no cause of action. This decree was affirmed by the District Judge, Mr. Mactier, who held that the plaintiff's claim was barred both by limitation and by the decision of the Revenue authorities under Act XI. of 1843. The appeal against this last-mentioned decision was heard by WESTROFF, C.J., and WEST, J., on 21st February 1876, and the following was the judgment of the Court:—

The first question for consideration is, whether, when the plaint was filed, this suit would lie in a Civil Court. The learned District Judge, on the authority of *Abaji Sankroji Bhosle v. Nilaji Balaji Bhosle*,⁽¹⁾ held that it would not lie. That case, however, was a suit seeking a declaration that the plaintiff was the *Vadil* amongst the holders of a *patilki vatan* and, as such, entitled to be appointed the officiating *patil* in preference to the others—his right to be a sharer not being disputed. That right of the plaintiff to be a sharer being admitted, this Court was, and is still, of opinion that there was not any jurisdiction on its part to declare him entitled to a preference over his co-sharers. There was not then any custom of succession to the patilship by primogeniture alleged or one confining the succession to a particular branch, and it, therefore, lay with the sharers to elect the officiator from amongst themselves, or, if they could not agree in such election, it lay with the Collector to nominate an officiator—Sec. 4, Act XI. of 1843. *Yesaji Apaji v. Yesaji Mhaloji*⁽²⁾ was a similar case. The present case differs from both of those cases, inasmuch as here the right of the plaintiff to the *vatan*, or any interest in it, is positively denied by the defendant Anandrav in his written statement. What the plaintiff

† The point here decided was that though the Court has no jurisdiction to declare an admitted sharer in a *patilki vatan* entitled to a preference over his co-sharers in the enjoyment of the office of *patil*, yet where the plaintiff sues to establish a right, denied by the other co-sharers, to a share in the *vatan* and eligibility for the office of *patil*, the Civil Court has jurisdiction to adjudicate on the claim.

(1) 2 Bom. H. C. Rep. 342. (2) 8 Bom. H. C. Rep. 35, A. C. J.

1872.

NINDAN-
GAYDÁ
v.
MALAN-
GAYDÁ.

1876.

BABAJI
v.
NANA.

1876. demands is not a declaration that he has a right preferable to that of the other sharers, but that he is a sharer, and eligible to fill the office of *patil*. In Regular Appeal 57 of 1871, decided on the 13th March 1871, where the Collector had turned the plaintiff out of the *patilship*, on the ground that the *Indmdār* had no right to appoint him to the office, the plaintiff's claim was that he was, as a sharer in the *vatan*, equally eligible with the first defendant to fill the office, and that the latter had not an exclusive right to officiate. This the Court declared, but declined to subject the Collector (the second defendant) to any stress to nominate the plaintiff to the office or the co-sharers to elect the plaintiff to it. And *Ningangavda v. Satyangavda*⁽¹⁾ affirms the same principle, *viz.*, that a suit will lie for a declaration that the plaintiff is eligible as a co-sharer in an office for nomination to it, where his title to be so regarded is denied. We, therefore, do not concur in the view of the learned District Judge, that the suit will not lie.

The point next to be considered is, whether the suit is barred by lapse of time. The facts necessary for the determination of this issue are not before the Court. The plaintiff indeed says that since A.D. 1848, his father's name has been taken off, *i.e.*, omitted from the *patta*; but he does not say at what time, since 1848, that happened, nor is there any finding by the Courts below at what time the name of the plaintiff's father was omitted from, or taken off, the Collector's books or register as a sharer in the *vatan* eligible for office as *patil*, or when such omission or removal became known to the plaintiff. The plaintiff states that "we," whereby we understand him to mean either his father or himself, officiated in 1846-47 as *patil*. Whether this is a fact has not been found by the Courts below. Nor has it been ascertained by these Courts in what manner the persons who did officiate were nominated to that duty. If they, or any of them, were elected by the sharers in the *vatan*, it ought to be ascertained whether the plaintiff voted or took part in such elections or any of them, and whether his right so to do was denied, and if so when. We cannot agree with the contention of the defendant Anand-rav, that the ground attributed to the Collector for denying the plaintiff's eligibility, *viz.*, that the plaintiff or his father had not officiated within two years before the annexation of Satara by the British, is valid. The plaintiff alleges, as we understand his plaint, that he is in possession of a fourth share in the *vatan* and of the *manpan*. Whether this is true has not been found by the Courts below; if true, it creates a presumption of eligibility to the office of *patil*, which may have, however, been repelled by evidence of exclusion from the *patilship* by adverse possession of his opponents.

We cannot agree in the contention of the plaintiff's pleader that the case of *Karia Gururav*,⁽²⁾ as reported, governs this case. It does not appear on the face of that report whether there had been any alienation by the plaintiff's ancestor of the *vatan* lands or not. If there had been an alienation, and the alienor had lived any, for 10 out of the 20 years during which the defendants

(1) 11 Bom. H. C. Rep. 232.

(2) 9 Bom. H. C. Rep. 282.

were in possession, we can well understand how the decision then made was arrived at; but it would not, so far as we can at present perceive, be applicable to this case. No doubt if A, being the incumbent of a service *vatan*, have alienated it, his heir B, although more than 12 years may have elapsed between such alienation and the death of A, would be entitled to recover the *vatan*, inasmuch as A's alienation would, under Reg. XVI. of 1827, Section XX., Cls. 1 and 2, be invalid as against his heirs; but under the interpretations of the Sadar Adalat of that Regulation on the 23rd February 1831 and the 5th December 1834, the prohibition against alienation in it did not extend to an alienation for any period not exceeding the lifetime of the *vatan*dar. No doubt, if a conveyance by an hereditary officer purported to give to the alienee a greater estate than one for the life of the alienor, the Court would, under the Regulation, have cut it down to an estate for his life. The heir's title to the land would not accrue until the death of A (the alienor), and the possession of the alienee would not be regarded as adverse to the heir, inasmuch as it would be a possession in no wise inconsistent with his title so long as the incumbent A lived. But, from the moment of A's death, the possession would be adverse to B, and, if B suffered 12 years from that event to elapse without bringing his suit to recover the land, we think not only B himself but also B's heir would be barred by the Limitation Law applicable to this case, Act XIV of 1859. To hold otherwise would be to put an end to the law of limitation altogether as to *vatan*s appendent to hereditary offices,—a course which we do not see any valid ground for adopting. The incumbent of a service *vatan* restrained by Reg. XVI. of 1827, Section 20, from alienating the *vatan* as against his heirs, is in a position parallel to that of a Hindu widow, who, except for certain special purposes, cannot, as against the heirs of her husband, alienate his immoveable property. Her alienation, except for such special purposes, is effective only to the extent of her own limited interest as widow, yet she completely represents the absolute estate in the immoveable property, and, under certain circumstances, the law of limitation might, during her incumbency, run against the heirs to the property whoever they might be—*vide per* Sir R. Collier when giving the judgment of the Privy Council in *Mussumat Bhagbutti Dase v. Chowdry Bolanath Thakoor*⁽¹⁾ and *per* Peel, C. J., in 2 Taylor and Bell Rep. 281, 282, and *Salchand v. Gambibai*.⁽²⁾

We reverse the decree of the District Judge and remand this case for re-trial on the merits. The main questions for determination on such re-trial will be, 1st, Whether the plaintiff is a co-sharer in the *patilki vatan*—2ndly, Whether this suit is barred by the law of limitation. In arriving at findings upon these questions, the re-trying Court will be assisted by a consideration of the points already indicated in this judgment. Costs throughout must abide the final result of the re-trial. The re-trying Court is to be at liberty to take such additional evidence as may be necessary and proper.

(1) L. R. 2 Ind. Ap. 256, *see* p. 261.

(2) 8 Bom. H. C. Rep. 140, O. C. J., *per* Westropp, C. J., pp. 155 to 157.
B. 720—d

1876

BABAJI
v.
NANA.

[APPELLATE CIVIL JURISDICTION.]

1874
December
10.

BAI MAHKOR (PLAINTIFF AND APPELLANT) v. BULAKHI CHAKU
(DEFENDANT AND RESPONDENT).^a

Declaratory Decree—Court Fees Act VII. of 1870, Section 1, Schedule II, Art. 17, Clauses 3 and 6—Valuation of suit—Bombay Civil Courts Act XIV. of 1869, Section 24—Jurisdiction—Procedure—Return of plaint—Civil Procedure Code, Act VIII. of 1859, Section 30.

A Subordinate Judge of the 2nd class has no jurisdiction to entertain a suit for the declaration of the plaintiff's title where the property in respect of which the declaration is sought exceeds Rs. 5,000 in value.

The law may lay down, for purposes of revenue, certain rules for the valuation of suits; but such valuation cannot be accepted as a criterion of the actual amount or value of the claim upon which the jurisdiction of a Court depends.

Whether a suit be merely to obtain a decree, declaratory of plaintiff's title to, or whether it be to establish his title, coupled with a prayer for possession of, the rights of a deceased person, the inheritance is the object in dispute.

The actual value of the estate, to which the plaintiff claims to be entitled, and not the value which it may eventually represent to the plaintiff, is the value of the subject-matter.

Where the Appellate Court decides that the Lower Court had no jurisdiction to entertain the suit, it should return the plaint to the plaintiff, in order that it may be presented to the proper Court.

THIS was a special appeal from the decision of J. W. Walker, Assistant Judge at Ahmedabad, reversing the decree of the 2nd Class Subordinate Judge of the same place.

Bái Máhkor sued to obtain a declaration that she was the heiress of Bái Adat, widow of one Kirpáram Venirám, and that as such, she was entitled to inherit the widow's property. The plaint was engrossed on a stamp of ten rupees, and assessed the value of the suit at Rs. 99. The action was filed in the Court of the 2nd Class Subordinate Judge of Ahmedabad. The value of the property, left by Bái Adat, and to which Máhkor sought by her suit to obtain a declaration of her right as heir, was estimated at more than Rs. 5,000. The Subordinate Judge held both the plaintiff and defendant to be heirs of the deceased, and both equally entitled to succeed to her property, and decreed accordingly. In appeal the Assistant Judge reversed that decree, and

threw out the plaintiff's claim on the ground that the first Court had no jurisdiction. He remarked:—

1874.

BÁI MÁHKOR

"A preliminary point is raised by the defendant's pleader, namely, that the Lower Court had no jurisdiction to try the suit, inasmuch as the property involved is over Rs. 5,000.

BULÁKHI
CHAKU.

"The suit was heard by a Subordinate Judge of the 2nd Class, and, therefore, under Act XIV. of 1869, Section 24, if the property involved is over Rs. 5,000, he had no jurisdiction. It is admitted by the plaintiff's pleader that Bái Adat's property exceeds Rs. 5,000; but it is urged that the Court has not to look to any property in this case, as a declaratory decree alone is sought. The plaintiff has recorded the decision of the District Judge on an application for a certificate of heirship to Bái Adat, and the deceased's property is there estimated at Rs. 8,000. Exhibit 11 is proved, and from that it also clearly appears that Bái Adat left the property exceeding Rs. 5,000.

'The effect of a declaration of right in the plaintiff's favour would, it is clear, be to give her possession of the property, so far as the defendant is concerned; for, on a suit by the plaintiff to obtain possession, it would not be competent to the defendant to contest the plaintiff's right. As held, therefore, by this Court in several recent cases, it follows that the Lower Court had no jurisdiction; it is not competent to a Court to make a declaratory decree in a suit where it could not grant consequential relief, if asked to do so. Here the Lower Court could not have entertained a suit to recover the property, and, therefore, it is incapable of making any binding declaration of right affecting that property.

"The contention that no property is involved is merely verbal, depending on the form the suit has been made to take. The only possible 'consequential relief' in the case would be the award of Bái Adat's property. And I may remark that, if it were true that no property was involved, then the plaintiff would not be entitled to a declaration of right; for, as laid down in a similar case, *Ramsurn Mitter v. Rakhaldoss*,⁽¹⁾ 'a Civil Court has no authority to make a declaration as to the validity or other-

(1) 11, Cal. W. R. Civ. Rul. 412.

1874. wise of a marriage where no question of property depends there-
on.' I reverse the decree of the Lower Court. All costs on the
BÁI MÁHKOB plaintiff."

v
BULÁKHI
CHAKU.

The appeal was argued before KEMBALL and NANABHAI HARIDAS, JJ.

Nagindás Tulsidás, for the appellant, contended that the 2nd Class Subordinate Judge of Ahmedabad had jurisdiction to entertain the suit; or if that Court had no jurisdiction, as held by the Assistant Judge, the plaint ought to have been returned to the plaintiff for presentation in the proper Court, and not rejected, as had been done by the Assistant Judge.

Dharghlál Mathuradás (Government Pleader) *contra*:—The value of the subject-matter in dispute in a suit should be estimated for purposes of jurisdiction, not according to the rules of the Court Fees Act, but by the actual market value of the property in suit: *Jeebráj Singh v. Inderjeet Mahtoon*⁽¹⁾; *Nanhoon Singh v. Tofanee Singh*⁽²⁾; *Baboo Lekraj Ray v. Kanhya Singh*⁽³⁾; *Thiagarája Mudali v. Ramanuja Charry*.⁽⁴⁾

KEMBALL, J.:—The suit in this case was instituted in the Court of the 2nd Class Subordinate Judge of Ahmedabad to obtain a decree declaratory of the right of the plaintiff to inherit the property of one Bái Adat, widow of Kirpáram Venirám; the claim was valued at Rs. 99, and the plaint was written upon a stamped paper of the value of Rs. 10. The defendant denied the plaintiff's title, and claimed to be himself the heir, and the Subordinate Judge found upon the merits that the plaintiff and defendant were co-heirs. Against this decision both parties appealed to the District Court, when the Assistant Judge, who heard the appeal, finding that the property left by the deceased exceeded in value Rs. 5,000, held that the Court of the Subordinate Judge, 2nd Class, had no jurisdiction to entertain the suit, and on this preliminary objection reversed the decree of the Subordinate Judge, and threw out the plaintiff's claim with all costs. The plaintiff now comes to this Court on special appeal asking to have the ruling of the Assistant Judge set aside and a judgment passed upon the cause.

(1) 13 Cal. W. R. Civ. Rule 109; S. C. 12 Benr. L. R. 15. Note (1).

The question is was the Assistant Judge wrong in holding that the Court of a Subordinate Judge of the 2nd Class was not competent to try the suit ?

By Section 24 of the Bombay Civil Courts Act (XIV. of 1869), the jurisdiction of a Subordinate Judge of the 2nd Class is declared to extend " to all original suits and proceedings of a civil nature wherein the subject-matter does not exceed in amount or value five thousand rupees." For the appellant it is argued that the subject-matter of the present suit is *not* the property of the deceased, all that is sought being a bare declaration of title without consequential relief; and reference is made in confirmation of this view to the Court Fees Act, which prescribes a fixed fee for plaints in declaratory suits where no relief is sought on the ground that it is not possible to estimate at a money value *the subject-matter in dispute* (see Section 4 of that Act and also Schedule II., Art. 17, cls. 3 and 6). On the other side it is contended that the Court Fees Act, which was framed for purely fiscal purposes, is not available as a guide in determining a question of jurisdiction; and as a decree upon title would be conclusive between the same parties in any subsequent suit for possession, *the property involved* must be taken to be the subject-matter in a declaratory suit.

We think the respondent's objection to the use of the Court Fees Act in ascertaining value for the purpose of jurisdiction is sound. The law may well lay down for purposes of revenue certain fixed rules for the valuation of suits; but obviously such valuation cannot be accepted as a criterion of a matter of fact such as the actual amount or value of a claim upon which the jurisdiction of a Court depends. See on this head the remarks of Sir J. Colvile in *Baboo Lekraj Roy and others v. Kanhya Singh and others*,⁽¹⁾ and also the judgment of Couch, C. J., in *Jeebraj Singh v. Inderjeet Mahtoon*,⁽²⁾ and the ruling of the Full Bench of the Madras High Court in *Thagaraja Mudali v. Ramanuja Charry*.⁽³⁾

In order to test the jurisdiction of a 2nd Class Subordinate Judge, which, as we have seen from the section of the Civil

(1) L. R. Ind. Ap. 317.

(2) 18 Calc. W. R. 109 Civ. Bul.

(3) 6 Mad. H. C. Rep. 151.

1874.
BÁI MÁHK
v
BULÁKHI
CHAKU.

1874. Courts' Act above quoted is subject to a pecuniary limitation we have to determine definitively what is the "subject-matter" of the present suit ; for if the Assistant Judge was right in holding that " the property involved " is its subject-matter, we are bound to accept his valuation of the property as conclusive of the fact of jurisdiction.

БАГ МАНКОР
"
БУЛАКНИ
ЧАКУ.

We do not think there is much force in the appellant's argument that a distinction exists between a suit to have a declaration of right and a suit for possession dependent on that right, and that the object of such a declaratory suit being merely to establish the fact of a right resident in the plaintiff, that right and not the property (the possession of which can only be obtained by a subsequent suit) is the subject-matter of the suit. It appears to us perfectly clear that whether the suit be merely for a decree declaratory of title to, or whether it be to establish title coupled with a prayer for possession of the rights of the deceased person, *the inheritance* is the object in dispute. For the purpose of assessing the stamp duties leviable on plaints a distinction no doubt is drawn by the Legislature, and the reason for this is intelligible. If a person desires merely a declaration of his title an arbitrary fee is fixed, but if possession of property itself is sought, a fee is charged according to the amount or value of such property ; but the question of jurisdiction does not rest on the whim or will of the suitor : the amount or value of the property involved must be taken as the test of jurisdiction (where there is a pecuniary limit prescribed by law) quite apart from the remedy sought ; to hold otherwise would be to admit this anomaly that a Court might be competent to determine bare title to property and yet would not have jurisdiction to consider the right to possession although the decree as to title would be conclusive on the superior Court when trying the possessory suit. It is true the law (*vide* Civil Procedure Code, Section 15) allows the Courts without granting consequential relief to make binding declarations of title ; but it has been held both here and in England (this Section 15 is almost a transcript of Stat. 15 and 16 Vict., Chap. 86, Section 50) that it is discretionary with Courts whether they will give a declaratory decree or not, and it has also been held that a declaratory decree will not be made unless the plaintiff would be entitled to conse-

quential relief if he asked for it, as, for instance, where an abstract 18
 decision on the point is asked, plaintiff being either in full pos- BAI M
 session or out of possession beyond the statutable period for the Bu
 institution of suits. CH

Lastly, the appellant argues that it is not proper to take the
 value of the deceased's estate as the value of the subject-matter,
 seeing that it may possibly be charged with debts and legacies
 which would considerably reduce the amount coming into his
 hands. With that the District Court had nothing to do. The
 plaintiff asked to be declared entitled to the inheritance; and in
 considering whether the claim was properly valued, the Court ob-
 viously could not estimate the value the estate might eventu-
 ally represent to the plaintiff.

We think, however, that the lower Appellate Court should
 have done what the Court of first instance was bound to do under
 the circumstances, and have offered to return the plaint to the
 plaintiff in order to its being presented in the proper Court. In
 confirming, therefore, the decree of the Lower Court with costs
 on the appellant, we order that she be allowed to have the plaint
 returned to her.

[APPELLATE CIVIL JURISDICTION.]

KALU BIN BHIWAJI (DEFENDANT AND APPELLANT) v. VISHRAM 1
 MAWAJI (PLAINTIFF AND RESPONDENT).*

Febr

*Court Fees' Act VII. of 1870, Schedule II, Article 17, Clauses 1 and 3—
 Valuation of suit—Jurisdiction—Act VIII. of 1859, Sections 5 and 26—
 Bombay Civil Courts Act XIV. of 1869, Section 24, Clause 2—Review—
 Act VIII. of 1859, Section 376.*

For the purpose of determining the question of jurisdiction, the valuation
 of a suit should be computed according to the market value of the subject-
 matter of the suit, and not according to the special rules applicable to
 valuation fixed in Act VII. of 1870.

(1) *Note*—On this point see also the judgment of Westropp, J., in *Beattie*
v. Jetha Dungarsi (5 Bom. H. C. Rep. 152, O.C.J.), where the question is
 fully discussed and the authorities collected at pp. 158 *et seq.*

* Special Appeal No. 374 of 1872

1877 *Nanhoon Singh v. Tofanee Singh* (12 Beng L. R. 113), *Jeebray Singh v. Inderjeet Mahtoon* (*Ibid.* 115, Note 1), and *Bai Mahhor v. Bulákhí Chaku* (*supra* p 538) followed.

KÁLU BIN
BHIWÁJÍ
v.
VISHRÁM
MAWÁJÍ.

PINNEY, J —A review may be admitted on any ground, whether urged at the original hearing of the appeal or not, whenever the Court considers that it is necessary to correct an evident error or omission, or is otherwise requisite for the ends of justice, following *Chintamani Pal v. Pyari Mohun Mookerjee* (8 Beng L R., 126). 15 W. R. 23. 1.

THIS was a special appeal from the order of W. M. Coghlan, District Judge at Thana, reversing the order of Cussetji Rastamji, 2nd Class Subordinate Judge at Kalyán.

The facts of the case are briefly these. The house in dispute had been sold at a Court's sale in execution of a money decree against one Dharamsi Dungarsi, and purchased by the defendant, Kálu Bhiwáji, for Rs. 175. The plaintiff VishráM Mawáji, who was in possession, having resisted the defendant in obtaining possession of the house, the latter, under Section 268 of the Civil Procedure Code, applied for the removal of the obstruction. Kálu succeeded in his application, and VishráM was referred by the Court to a regular suit to establish his right to the property in question. VishráM accordingly brought the present suit under Section 269 of the Code, and prayed that the summary order might be set aside, and that he might be declared entitled to retain the house in his possession. The plaint was written on a stamp of the value of Rs. 10. The plaintiff's pleader, however, admitted, in answer to a question by the Court, that the market-value of the house was above Rs. 5,000. On that admission the Subordinate Judge held that the estimated value of the subject-matter of the suit, as illustrated in Clause 4, Section 26, of the Code, exceeded Rs. 5,000; and that, therefore, under Section 24, Clause 2, of the Bombay Civil Courts Act XIV. of 1869, he had no jurisdiction to entertain the suit. He, however, held that the stamp duty, Rs. 10, paid by the plaintiff on his plaint was sufficient under the Court Fees' Act VII. of 1870, Schedule II., Article 17, Clauses 1 and 3. But he was of opinion that the valuation of a suit for the purposes of the Court Fees' Act was different from its valuation for the purpose of determining the question of the jurisdiction of a Court, under Sections 5 and 26 of Act VII. of 1859, and Section 24 of Act XIV. of 1869. He accordingly rejected the plaint, as the plaintiff declined to receive

In appeal, that order was reversed by the District Judge. He was of opinion, that as the plaint was properly stamped with a stamp of ten rupees, the claim was within the Subordinate Judge's jurisdiction, and that the latter Court had no concern with the value of the house in question.

1877

KÁLUB
BHIWA
v.
VISHRA
MAWA

The defendant Kálu preferred a special appeal against the decision of the District Judge, and the appeal was heard in the first instance by GIBBS and PINHEY, JJ, on the 28th November 1873.

Vishnu Ghanasham, for the appellant, contended that the Subordinate Judge, refusing to try the suit on the ground of want of jurisdiction, was perfectly correct, and cited in support of his contention *Jeebray Singh v. Inderjeet Mahtoon*,⁽¹⁾ and *Nankhoo Singh v. Tofanee Singh*.⁽²⁾

Rao Saheb V. N. Mandlik, for the respondent, was not called upon.

PER CURIAM:—The Court confirms the order of the Lower Appellate Court, with costs on special appellant.

Vishnu Ghanasham on the 25th February 1874 applied for a review of the above decision to PINHEY, J. (the other Judge, Mr. GIBBS, having in the meantime ceased to be on the Bench of the High Court, in consequence of his appointment as a Member of the Governor's Council). The review was sought on the following, among other grounds:—(I) A suit ought to be valued for the purpose of determining the jurisdiction of a Court, not according to the special rules prescribed in the Court Fees Act, but according to the market value of the property claimed. (II) The decision is contrary to Act XIV of 1869, Section 24, Clause 2, and Act VIII of 1859, Section 26, Clause 4. A rule *nisi* having been granted on the 14th August 1874, the same was argued before PINHEY, J., on the 25th September 1876.

Pándurang Balabhadra appeared to show cause against the rule. The grounds on which the review is sought, are either those urged at the hearing of the special appeal or new grounds. But a review is not to be granted on such grounds, as ruled by the Calcutta High Court: *Jonab Ali v. Chundee Churn Dey*,⁽³⁾ and *Rajendro Protap Sahee v. Bhowabul Singh*.⁽⁴⁾ A review is not allowed on

⁽¹⁾ 18 Calc. W. R. CIV. R. 10), S. C. 12 Beng. L. R. 115, Note(1).

⁽²⁾ 20 Calc. W. R. CIV. R. 33, S. C. 12 Beng. L. R. 113.

⁽³⁾ 11 Calc. W. R. CIV. R. 202 ⁽⁴⁾ 14 Calc. W. R. CIV. R. 105.

1877 the ground that the authorities to which the attention of the Court ought to have been called were not cited at the first trial *Ellem v Basheer* ⁽¹⁾ As a matter of fact, the grounds of the present application for review were sufficiently argued before and considered by two Judges, who unanimously came to the conclusion that the Subordinate Judge had jurisdiction to try the claim. The learned pleader also referred to *Dwarkanath Doss v. Manick Chunder Doss*, ⁽²⁾ *Nobee Kishen v. Shih Pershad*, ⁽³⁾ *Shama Churn Chuckerbutty v. Bindabun Chunder Roy*, ⁽⁴⁾ *Prosunno Nath Dutt v. Judoonath Paul*, ⁽⁵⁾ *Roy Meghraj v. Beejoy Gobind*, ⁽⁶⁾ *Krishnarav Venkatesh v. Vassudev Anant*, ⁽⁷⁾ *Motichand Jurchand v. Dadabhai Pestonji* ⁽⁸⁾

Vishnu Ghanasham appeared in support of the rule:—The authorities of the Calcutta High Court, cited in support of the position that a review should not be granted on points already discussed and decided at the original hearing of a case, nor on new points, must be regarded as overruled by a Full Bench decision of that Court in the case of *Chintaman Pal v. Pyari Mohan Mookerjee* ⁽⁹⁾ What the Court has to consider and decide is, as laid down in that case, whether a review is necessary to correct any evident error, or is otherwise requisite for the ends of justice. The other authorities quoted do not apply to the present case.

In making the rule absolute, PINHEY, J, said:—I am of opinion that the rule *nisi* for a re-hearing of this special appeal must be made absolute. I entirely concur in the ruling of the Calcutta High Court in *Chintaman Pal v. Pyari Mohan Mookerjee*. ⁽¹⁰⁾ And as the estimated value of the house, which is the subject-matter of this suit, is more than Rs. 5,000, I am of opinion that the 2nd Class Subordinate Judge at Kalyán had no jurisdiction to try the suit. The application for review is, therefore, admitted, and the special appeal must be set down for re-hearing. Costs of this application to follow the result of the trial.

The special appeal, accordingly, was re-heard by WESTROPP, C J., and NANABHAI HARIDAS, J., on the 14th of February 1877.

⁽¹⁾ L. L. R. 1 Cal. 184, S. C. 24 Cal. W. R. Civ. Rul. 383

⁽²⁾ 9 Cal. W. R. Civ. Rul. 102. ⁽³⁾ *Ibid* 161. ⁽⁴⁾ *Ibid* 181. ⁽⁵⁾ *Ibid* 589.

⁽⁶⁾ 23 Cal. W. R. Civ. Rul. 438. ⁽⁷⁾ 11 Bom. H. C. Rep. 15. ⁽⁸⁾ *Ibid* 186.

⁽⁹⁾ 6 Beng. L. R. 126.

⁽¹⁰⁾ 6 Beng. L. R. 126.

Vishnu Ghanasham relied upon the authorities already cited.

1877

Pandurang Bahubhadra, for the respondent, relied upon the two cases *Krishnarav v. Vasudev*⁽¹⁾ and *Motichand v. Dadabhai*.⁽²⁾ He also contended that the market value of the house must be taken to be the price paid by the defendant, Rs. 175.

KALUBIN
BHIWADI
v.
VISHRAM
MAWADI.

WESKROFF, C J :—This Court, on the authority of the Calcutta cases *Nanhoon Singh v. Tofance Singh*⁽³⁾ and *Jelraj Singh v. Inderjeet Mahtoon*,⁽⁴⁾ and of *Bai Mahhor v. Bulahn Chaku*,⁽⁵⁾ reverses the order of the District Judge and restores that of the Subordinate Judge with costs; but, in accordance with the course followed in the last-mentioned case, directs that the plaint be returned to the plaintiff in order that he may, if so advised, present the same in the proper Court.

[TESTAMENTARY AND INTESTATE JURISDICTION.]

MANICKBAI, APPLICANT; HORMASJI BOMANJI, CAVEATOR.*

March 5.

Will—Acknowledgment of signature by testator—Indian Succession Act (X of 1865), Section 50, Clause 3—Wills Act (1 Vic, Cap 26), Section 9

It is a sufficient acknowledgment by a testator of his signature to his will if he makes the attesting witnesses understand that the paper which they attest is his will, though they do not see him sign it, or observe any signature to the paper which they attest, provided that the Court is satisfied that the testator's signature was on the will when the witnesses attested it.

THE applicant, as widow and executrix of Bomanji Burjorji Shroff, propounded as his last will a document bearing his signature and those of two attesting witnesses, who identified the document as one which they, at the request of the testator, had attested in the office of Messrs. Ralli Brothers, where they and the testator were all employed. They both said that, before they attested it, the testator told them that it was his will, but that he did not sign it in their presence or read it to them. One said he could not remember whether he saw the testator's signature, or any

* In the matter of the last will and testament of Bomanji Burjorji Shroff.

(1) 11 Bom. H. C. Rep. 16.

(2) 11 Bom. H. C. Rep. 186.

(3) 12 Beng. L. R. 113.

(4) 12 Beng. L. R. 115.

(5) *Supra* p. 538.

1877 writing, on the paper when he attested it, but if he did, he did
 MANICKBAI not particularly notice it. The other said he was quite sure he
 v. did not see the testator's signature, as the paper was folded in
 HORMASJI such a way that he could see no writing whatever on it. The
 BOMANJI. evidence of the testator's widow went to show that, before start-
 ing for the office of Messrs. Ralli Brothers on the morning of the
 day on which the other two witnesses attested the will, the testator
 wrote and signed his will at home, and then took it with him when
 he left the house to go to the office.

The caveator opposed the grant of probate to the applicant mainly on the ground of undue execution. He also alleged that the testator had executed another subsequent will, but of this there was no evidence.

On these facts *Marriott*, Advocate General (Acting), and *Inverarity*, for the applicant, contended that there had been by the testator an acknowledgment of his signature sufficient to satisfy the requirements of Act X of 1865. The testator said: "This is my will;" that is equivalent to saying "the signature on this paper is mine," for without his signature the paper could not be his will. The evidence shows that at least it is more probable that the signature of the testator was on the paper when the witnesses attested it than that it was not. If so, an acknowledgment by the testator that the paper is his will is a sufficient acknowledgment of his signature, though the witnesses do not see him sign it or notice his signature on the paper when they attest it: *Cooper v. Bockett*,⁽¹⁾ *Gwillim v. Gwillim*,⁽²⁾ *Smith v. Smith*,⁽³⁾ *Beckett v. Howe*.⁽⁴⁾

Latham and *Farran* for the caveator:—Act X of 1865, Section 50, requires the *personal* acknowledgment of the testator, whereas the English statute (1 Vic., Cap. 26) requires merely the acknowledgment. The introduction of the word "personal" into the Indian Act shows an intention to particularize more strictly than the English Act what has to be done by the testator, and, therefore, the cases on the English Act cannot be admitted as authorities in the construction of the Indian Act. The cases cited by the other side only go to show that where there is a conflict between the

⁽¹⁾ 4 Moore P. C. 419.

⁽²⁾ 3 Sw. and Tr. 200

⁽³⁾ L. R. 1 P. and D. 143.

⁽⁴⁾ L. R. 2 P. and D. 1.

evidence of the witnesses and the facts and circumstances of the case, the Court may attach greater weight to the presumption to be drawn from the facts and circumstances than to the evidence of the witnesses: *Ilott v. Genge*,⁽¹⁾ *Fischer v. Popham*,⁽²⁾ *Croft v. Croft*.⁽³⁾

1877

MANICKBAI

v.
HORMASJI
BOMANJI.

Inverarity in reply:—*Ilott v. Genge*⁽⁴⁾ and *Fischer v. Popham*⁽⁵⁾ do not apply, because in neither of those cases did the testator inform the witnesses that the paper which they were attesting was his will. In *Croft v. Croft*⁽⁶⁾ the evidence clearly established the undue execution of the will. The introduction of the word “personal” into the Indian Act makes no difference, unless, perhaps, in such a case as *Inglesant v. Inglesant*.⁽⁷⁾

GREEN, J.:—The question for decision is whether, under the 3rd clause of Section 50 of the Indian Succession Act X of 1865, the two attesting witnesses received from the deceased a personal acknowledgment of his signature to the paper here propounded as the last will of Bomanji Burjorji Shroff. The two attesting witnesses state that, in the office of Messrs. Ralli Brothers, Bomanji produced a paper, saying it was his will, and asked them to attest it, which they did, and that this was the same paper which is now propounded as his will. Both say, one more positively than the other, that they then saw no writing on the paper which they attested. If Manickbai's evidence is to be relied on, this paper was written and signed by Bomanji at his own house before he took it to the office of Messrs. Ralli Brothers and there got the witnesses to attest it. The circumstance which, to some extent at least, threw doubt, in my mind, as to that evidence, was this: that an affidavit was proposed to be made by the two attesting witnesses (which, however, they refused to make) that the will had been signed in their presence by Bomanji at the office of Messrs. Ralli Brothers. It did not, however, appear clearly that instructions for this statement had been given by Manickbai. The provisions of the English Wills Act (1 Vic., Cap. 26, Section 9), with regard to the acknowledgment by the testator of his sig-

(1) 4 Moore P. C. 265.

(2) L. R. 3 P. and D. 246.

(3) 34 L. J. P. M. and A. 44. (4) 4 Moore P. C. 265.

(5) L. R. 3 P. and D. 246.

(6) 34 L. J. P. M. and A. 44.

(7) L. R. 3 P. and D. 172.

1877
MANICKBAI
v.
HORMASJI
BOMANJI.

nature to his will, are substantially the same as those of the Indian Succession Act X of 1865, Section 50, for I think the introduction of the word "personal" into the last mentioned Act is not material in such a case as the present. The question: what is a sufficient acknowledgment by a testator of his signature to his will? was considered in the cases of *Cooper v. Bockett*,⁽¹⁾ *Gwillim v. Gwillim*,⁽²⁾ *Smith v. Smith*,⁽³⁾ and *Beckett v. Howe*.⁽⁴⁾ The rule to be gathered from those cases is that, if the testator produces a paper and makes the witnesses understand that it is his will, that is an acknowledgment of his signature, if the Court is satisfied that his signature was on the will when the witnesses attested it. The circumstances of the present case, coupled with the evidence of Manickbai, have led me to the conclusion that when the testator produced this paper in the office of Messrs. Ralli Brothers, and informed the attesting witnesses that it was his will, and got them to attest it, his signature was already on it. That being so, I must hold that he sufficiently acknowledged his signature to these witnesses. Probate must, therefore, issue to Manickbai. The costs of both parties must come out of the estate, except so far as occasioned by the contention of the caveator that probate ought not to issue on the ground that Bomanji Burjorji had executed another will subsequent to the one propounded. These last-mentioned costs must be paid by the caveator Hormasji Bomanji.

[ORIGINAL CIVIL JURISDICTION.]

March 5. BHIKAJI SABAJI AND OTHERS (PLAINTIFFS) v. BAPU SAJU AND OTHERS (DEFENDANTS).*

Indian Companies Act (X of 1866), Section 4—Partnership—Association—Acquisition of gain—Illegal agreement.

An association of artizans for the purpose of enhancing the price of their work by bringing all the business of the trade into one shop and dividing the prices of the work done amongst the members according to their skill, is an association that has for its object the acquisition of gain, and if consisting of more than twenty persons must be registered.

Where more than twenty artizans signed an agreement whereby they constituted themselves an association for the above purpose, but which association was not registered as a company under Act X of 1866.

(1) 4 Moore P. C. 419. (2) 3 Sw. and Tr. 200.
 (3) L. R. 1 P. and D. 143. (4) L. R. 2 P. and D. 1.

Held that the Court could not grant an injunction to restrain the breach of such agreement.

1877

BHIKAJI
SABAJI

v.

BAPU SAJI

On 14th October 1875 fifty-seven persons following the trade of carvers in wood executed an agreement, the object of which was thus stated in its first clause :—"Of late, we all, the followers of the trade of ornamental work, have, in competition with each other, made this business so cheap that it has come to pass that even our stomachs cannot be filled by means of labour. Some of the makers of ornamental work have left this business and adopted other trades. Therefore, in consequence of this business having become so cheap, all will be compelled to give it up and go away, and no one would even know how to do this sort of work. And as to our Hindustan, which is celebrated for its ornamental work, such fame will vanish and be tarnished. Therefore our executing and delivering this under-written contract being proper, we give it in writing."

The agreement then went on to provide that the first plaintiff should be the president of the society and the second and third plaintiffs and the first three defendants vice-presidents; that the affairs of the society should be regulated by these six members, who should receive all orders for work, distribute it among the members, and fix the price to be paid for it; that a shop should be hired to which all work should be taken; that no member should take any orders separately on his own account, or otherwise than through the president and vice-presidents, or do any work at any price other than that fixed by the president and vice-presidents; that the president and vice-presidents should distribute the work amongst the members according to their skill, and pay to each the price of his own work after deducting As. 1½ in the rupee for charity; that the shop should be hired, and the rent and all other necessary outlays made by the president and vice-presidents should be contributed to by the several members according to what they received, and that the agreement should remain in force for five years.

On 12th November 1875 the president and vice-presidents executed an agreement, binding themselves to carry out and give

1877
 BHIKAJI
 SABAJI
 v
 BAPU SAJU

The plaintiffs sued the defendants for breach of these agreements. The defendants answered that the plaintiffs had themselves committed a breach of the agreement in lowering the price of work without the consent of their colleagues, the first three defendants. A rule *nisi* was granted, calling on the defendants to show cause why they should not be restrained from carrying on the business of working and carving in wood otherwise than in accordance with the provisions of the two agreements of 14th October 1875 and 12th November 1875, entered into by them conjointly with the plaintiffs.

The rule came on for argument before SARGENT, J., on 5th March 1877.

Macpherson for the defendants showed cause :—This society is a partnership or association for the purpose of gain, and consisting of more than twenty persons, it ought to be registered, as required by Act X of 1866. Not being registered it is an unlawful association, and no effect can be given to the agreement under which it was formed. Even if the agreement can be enforced, still the plaintiffs, having acted in violation of it in lowering the price of work without the consent of the first three defendants, are not entitled in the present case to enforce the agreement against the defendants.

Mayhew in support of the rule :—An association for gain, in Act X of 1866, means such an association as a partnership or company, in the sense in which those words are ordinarily used. That is, an association the gains of which are paid into a common fund, and then distributed in certain fixed shares. In this society there is no common fund. Each member is paid his own earnings independently of all the rest. The object of the society is not the acquisition of a common gain, but the centralization of a common business. The plaintiffs did not lower the price of work until the defendants had already seceded, and commenced to work independently and in breach of the agreement.

SARGENT, J. :—This matter comes before me on a rule *nisi* obtained by the plaintiffs, calling on the defendants to show cause why they should not be restrained from working in wood, and carving boxes and other articles, independently of two agree-

ments entered into by them conjointly with the plaintiffs. It appears that the parties to this suit are all artizans, carrying on the trade of carvers in wood, or "working box-makers" as they call themselves in their agreement. On 14th October 1875 they all entered into an agreement, by which the first plaintiff was appointed president and five other persons were appointed vice-presidents, to manage, according to a majority of votes, the business of the society for a term of five years. Fifty-seven of these "working box-makers" signed this agreement, binding themselves for five years not to enter in the service of any body, to do the business of "working box-makers" and not to receive work except through the president and vice-presidents. On 12th November 1875 the president and vice-presidents signed an agreement, binding themselves to perform the agreement of 14th October 1875. By these two agreements the parties to them have agreed with one another to form themselves into a society, and the object of such society, or, at any rate, one of the principal objects, was the acquisition of gain by the members by means of raising the price of their work. That this was so, appears from the statement of the object for which the society was formed, contained in the first clause of the agreement of 14th October 1875. [The learned Judge here read the clause set out above, and then continued.] Now I think it is difficult to say that this agreement does not create a partnership. But it is not necessary to decide the point, as in any case it creates an association of artizans for the purpose of carrying on their trade with a view to gain by its individual members. The principal object is by means of combination and association to increase the gain which they have heretofore been making from their work, and for this purpose they appoint certain members of their craft as managers who are to superintend the giving out of work according to the skill of the several members who are to be paid accordingly. If, then, this be an association of persons for the acquisition of gain by its individual members, it is, under the provisions of Section 4 of the Indian Companies Act X of 1866, an unlawful association, for it consists of more than twenty persons (more than fifty having, in fact, signed the agreement), and it has not been registered. That section in the Indian Companies Act is in effect identical with the corresponding section of the

1877

BHUKAJI

SABAJI

v

BAPU SAJU.

1877 English Act, Statute 25 and 26 Vic., Cap. 89, Section 4, except that
 BHIKAJI the English Act saves Mining Companies subject to the jurisdic-
 SABAJI tion of the Stannaries, and, therefore, *Harris v. Amerly*,⁽¹⁾ which
 v. decided, on the English Act, that an association of more than
 BAPU SAJU. twenty persons for the purpose of acquisition of gain which had
 not been registered being illegal, the members of it could not rely
 on their agreement for the purpose of establishing any right, is an
 authority applicable to the present case.

Willes, J., says :—" When we find an association like this, which
 is rendered illegal by an act of parliament, we cannot take notice
 of the agreement under which they become tenants, for the pur-
 pose of establishing a right in a court of law." So, too, Byles, J.,
 says :—" The statute having declared the association in question to
 be illegal, no rights can be acquired by any of its members which
 are founded upon that which is so declared to be illegal." So
 here we have a partnership, or, at any rate, an association, for the
 purpose of carrying on a business that has for its object the acqui-
 sition of gain, and consisting of more than twenty persons, and
 being unregistered, it is an illegal association. It is obvious,
 therefore, that none of the parties acquired any rights under their
 agreement which can be enforced in a court of law. The rule
 must, therefore, be discharged with costs.

[APPELLATE CIVIL JURISDICTION.]

February 1. ANANTA (DEFENDANT AND APPELLANT) v RAMABAI (PLAINTIFF AND
 RESPONDENT).*

Hindu Law—Leprosy—Maintenance—Exclusion from inheritance.

Incurable leprosy of the sanious or ulcerous type, contracted before parti-
 tion, excludes the person afflicted with it from a share in the ancestral estate.

THIS was a special appeal from the decision of M. B. Baker,
 Senior Assistant Judge at Sholapur, in the District of Poona,
 amending the decree of Ravji Govind, 2nd Class Subordinate
 Judge at Barsi.

Ramabai, sued Joti and Ananta for possession of certain land,
 which she alleged had been sold to her by one Nagu on 17th No-

(1) L. R., 1 C. P. 148.

* Special Appeal No. 251 of 1876.

vember 1868 for Rs. 289. The plaint further alleged that Joti, having obtained a decree on a collusive mortgage of the land by Nagu, had ousted Ramabái and taken possession of the land on 18th April 1873.

1877

ANANTA
v.
RAMABÁI

Joti claimed under a mortgage from Nagu, and a decree against Ananta and Nagu's wife upon the mortgage. Ananta was a leper. He alleged that the land had been divided equally between him and Nagu, and that the sale by Nagu to the plaintiff was void as to his share.

The Subordinate Judge made a decree in favour of the plaintiff for a moiety of the land, and rejected her claim to the other moiety, which he held ought to be left as a provision for the maintenance of Ananta, though he was not, by reason of his leprosy, entitled to a share in the ancestral estate, but had a claim for maintenance only.

In the appeal preferred by Ramabái, the Assistant Judge amended the decree of the Subordinate Judge by awarding the whole of the land to the plaintiff, on the ground that as Ananta, by reason of his leprosy, could not claim a share in the land, the plaintiff, if entitled to any, was, under the sale to her by Nagu, entitled to the whole.

Against this decision Ananta appealed to the High Court, contending that his leprosy, not being congenital, did not exclude him from a share in the land.

The special appeal was heard by WESTROPP, C.J., and NANABHAI HARIDAS, J.

Bomanji Phirosha for the appellant.

Shantlaram Narayan for the respondent.

WESTROPP, C.J.:—We think that we must regard the Assistant Judge as having found that the land, the subject of this suit, was undivided at the time of its sale by Nagu (November 17th, 1868) to the plaintiff Ramabái, and that fact does not now seem to be in controversy.

The contention of the appellant (the second defendant) Ananta is that an issue ought to have been directed to ascertain whether

1877
ANANTA
"RAMABAI.

His learned pleader has referred in support of that view to Manu, Ch. IX, pl. 201, "Eunuchs and out-castes, persons born blind or deaf, mad men, idiots, the dumb, and such as have lost the use of a limb, are excluded from heritage," but neither that text nor Calluea Bhatta's Commentary upon it applies to the case of leprosy. The word "Nirindiya" rendered, as we think rightly, by Sir W. Jones, as in that passage meaning "such as have lost the use of a limb,"⁽¹⁾ could not, even in its more extended sense of the loss of a sense, organ, limb or member, be properly applied to leprosy. We must, therefore, regard Manu as silent upon the subject, and not an authority upon either side of the question. The Mitakshara treats "a person afflicted with an incurable disease" as disqualified: Ch. II, Sec. X, pl. 1, which disease it explains (pl. 2) as an "irremediable distemper such as marasmus or the like," and some classes of leprosy have been regarded as coming within that description: *Mattuvelayuda Pallai v. Paraskti*⁽²⁾ decided on the 31st October 1860, *Janardhan Pandurung v. Gopal and Wasudeo Pandurung*,⁽³⁾ and in neither of these cases does it appear to have been so much as contended that leprosy to disqualify must be congenital. And if pl. 6 of the Mitakshara, Ch. II, Section X, be, as we are inclined to think it is, applicable to leprosy when incurable, it tends to show that if it supervenes at any time before partition, the person so afflicted would be excluded from a share. The case of *Murari Gokuldas v. Parvatibai*,⁽⁴⁾ which has been mentioned in the argument, does not apply here. It was a case of blindness, and is applicable to the infirmities comprised in the text of Manu to which we have referred as not dealing with leprosy or such like diseases. The reply of the Pandits of the Benares Sanskrit College (who, as a rule, were strongly influenced by the Mitakshara doctrines) to the case put to them, and which is mentioned in the note by Mr. Sutherland to the case of *Lakshmi Narayan Singh v. Tulshi Narayan Singh*,⁽⁵⁾ clearly implies, in what they have said as to the right of the son of a leper to succeed if he were born before his father was afflicted with the leprosy which they considered to disqualify the father, that leprosy supervening after birth disqualified the leper. Sir

⁽¹⁾ See I. L. R. 1 Bom. 185. ⁽²⁾ Mad. S. D. A., Rep. 1859-1862, p. 239.

⁽³⁾ 5 Bom. H. C. Rep. 145, A. C. J. ⁽⁴⁾ I. L. R. 1 Bom. 177.

Thomas Strange distinguishes between infirmities, such as blindness, deafness, dumbness, &c., which to disqualify must be coeval with birth (Vol. I, 152), and disqualifying diseases such as leprosy, &c. (*Ibid.* pp. 154, 155, 156), which the Hindu religion regards as visitations not only for sins committed in a preceding state, but also for sins committed in this life; and, therefore, such visitations are not necessarily congenital in order to disqualify. See also cl. 2, pl. cccxx 3 Dig. p. 303, where the condition of congenitality is applied to insanity, blindness, or lameness by Narada, and not to obstinate or agonizing disease. He lays it down, as we deem correctly, as the result of the Hindu authorities (see specially 3 Dig., pp. 303 to 322, ed. of 1801), that the leprosy to disqualify must be of the sanious or ulcerous kind, which was, we think, the virulent or aggravated type of leprosy required by the Bombay and Madras cases already cited by us. We direct the Assistant Judge to try the following issues, viz. :—

1. Whether the leprosy of Ananta was of the sanious or ulcerous type generally regarded as incurable; and, 2nd, if the Assistant Judge shall determine the first issue in the affirmative but not otherwise, what is a proper maintenance for Ananta having regard to his condition of life and the nature of the property. Such maintenance should not exceed one moiety of the land sued for; but, in so saying, this Court does not intend to express any opinion whether or not the maintenance allotted ought to be equal in extent to such moiety.

The Court reserves all other questions in the cause, including the question of costs.

[APPELLATE CIVIL JURISDICTION.]

UMABAI, WIDOW OF SHANKARAV (PLAINTIFF AND APPELLANT)
v. BHAVU PADMANJI (DEFENDANT AND RESPONDENT).*

February 12.

Hindu Law—Blindness—Incapacity for inheritance.

Incurable blindness, if not congenital, is not such an affliction as, under the Hindu law, excludes a person from inheritance.

THIS was a special appeal from the decision of C. H. Shaw, District Judge at Belgaum, affirming the decree of A. M. Cantem, 1st Class Subordinate Judge at the same place.

1877

ANANTA
v.
RAMABAI.

1877
 UMABÁI
 v.
 BHAVU
 PADMANJI.

Shankarrav, deceased, had obtained a decree against Padmanji, father of the defendant, Bhavu, and attached the house in dispute, as the property of his judgment-debtor. The attachment, however, was removed on the application of Bhavu, and Shankarrav was referred to a regular suit. The present suit, therefore, was instituted by Umabái, as heir of the deceased Shankarrav, to establish her right to sell the house in question. Bhavu, who was incurably blind, but had not been born blind, pleaded that the property was his own self-acquisition, and was not, therefore, liable to be sold in execution of a decree against his father. Both the lower Courts found that Bhavu had been separate from his father for many years, and that the house had been his (Bhavu's) separate property. They accordingly rejected the plaintiff's claim and made a decree in Bhavu's favour. In appeal, however, the District Judge observed regarding Bhavu's blindness, although there was no issue on the point:—There can be no doubt that Bhavu Padmanji is incurably blind; the unfortunate man has appeared in Court, and the appearance of both eyes, like two balls of curd, proves his condition. Consequently, Steele, page 61, is an authority that Bhavu could not be included in any inheritance. Stokes' Hindu Law, page 107, seems to exclude persons *born* blind, and this it does not appear Bhavu was. But both Steele and Stokes show a person incurably afflicted is personally excluded from inheritance. Nothing, therefore, can be more reasonable to believe than that Padmanji may have provided separately for his son Bhavu, or, if he did not do so, that the maternal grand-mother of Bhavu (Kashi) did provide for him."

The special appeal was argued before WESTROPP, C.J., and NANABHAI HARIDAS, J.

Bhairavnath Mangesh for the special appellant.

Vishnu Ghanasham for the special respondent.

WESTROPP, C.J.:—This Court does not agree in the opinion of the District Judge that Hindus, though not born blind, are, if they become incurably blind, thereby rendered incapable of inheritance. See *Murariji Gokaldas v. Parvatibai*⁽¹⁾ and *Anunta v.*

Ramabai,⁽¹⁾ in which latter case the incurable diseases, which incapacitate for inheritance, are mentioned. But inasmuch as he has found as facts, that Padmanji and Bhavu were separate in estate, and that the house in dispute was purchased for Bhavu as his absolute property with funds supplied for the purpose by Kashi, his maternal grand-mother, the Court affirms the District Judge's decree with costs.

1877

UMABAI
v.
BHAVU
PADMANJI.

[APPELLATE CIVIL JURISDICTION.]

HONAMMA (DEFENDANT AND APPELLANT) v. TIMANNABHAT AND ANOTHER (PLAINTIFFS AND RESPONDENTS).*

February 1.

Act XXI of 1850—Hindu widow—Loss of caste—Incontinence—Forfeiture of rights or property—Starving maintenance.

Since Act XXI of 1850 came into force, mere loss of caste does not occasion a forfeiture of rights or property.

A Hindu widow entitled to a bare or starving maintenance, under a decree made in a suit, brought by her for maintenance against the representatives of her deceased husband, is not to be deprived of the benefit of that decree by the fact that she has since its date been leading an incontinent life.

Rajah Parthee Singh v. Ranee Raj Kower (20 Calc. W. R. 21 Civ. Rul.) distinguished.

THIS was a special appeal from the decision of G. M. Macpherson, District Judge at Kanara, reversing the decree of the Subordinate Judge of Honawar.

The plaintiffs Timannabhat and Theshbhat brought this suit against Honamma, and alleged in the plaint that the defendant had obtained a decree against them for maintenance, but that she had forfeited her right thereto, as she had been leading an incontinent life since the date of that decree, and had in consequence been excommunicated by the caste. The defendant denied the charge of incontinence, and pleaded that she was entitled to the maintenance. The Subordinate Judge found on the evidence that the defendant had been guilty of incontinence, but held that she did not lose her right to maintenance on that account. In appeal, the District Judge reversed that decree, and decided that she forfeited her right to maintenance by reason of her incontinent life.

The special appeal was heard by WESTROPP, C.J., and NANABHAI HARIDAS, J.

(1) *Supra* p. 554.

* Special Appeal No. 277 of 1876.

1877
 HONAMMA
 v
 TIMANNA-
 BHAT.

Pandurang Balibadhra for the appellant:—Adultery and loss of caste do not deprive a widow of her right to maintenance: *Parvati v. Bhatu*,⁽¹⁾ Act XXI of 1850. What the appellant gets is a bare or starving maintenance, and even an adulterous widow is entitled to such maintenance under Hindu law: 1 Strange 157, 2 Strange 32, 344 (Edn of 1825), Norton's Leading Cases 37.

No one appeared for the respondent.

WESIROPP, C.J.:—We adhere to the opinion expressed in *Parvati v. Bhatu*,⁽²⁾ that since Act XXI of 1850 came into force, mere loss of caste does not occasion a forfeiture of rights or property. We, therefore, proceed to consider this case independently of the fact that the defendant has been put out of caste. On the findings of the learned District Judge we must regard the defendant as guilty of incontinence since the date of the decree in appeal No. 102 of 1867, made by Mr. West, when Judge of Kanara, and affirmed here in special appeal. The Judge in the present suit says that it is asserted that she is still living in that condition; but he does not positively find that allegation to be true—and he does state that she resides with her mother-in-law.

The Hindu law books of especial force in this Presidency—Mayukha, Ch. IV, Section 8, pl. 9; Mitakshāra, Ch. II, Section 1, pl. 37, 38—support the position that even an incontinent widow is entitled to a bare maintenance. Steele, p. 42, pl. 25, 1st Edn., and p. 36, 2nd Edn., and 1 Stra. H. L. 157; the notes of Mr. Ellis at pp. 32 and 344 of 2 Stra. H. L.; and Norton's L. C., p. 37, are to the same effect. The maintenance allotted to the present defendant in appeal 102 of 1867 was nothing more than what is called a bare maintenance, and so it was described by Mr. West in his judgment. We cannot, in this suit, take into consideration the question whether or not the respondent, by reason of his not having family property, was liable to supply even a bare maintenance to the defendant. The only question before us is whether since she obtained an award of maintenance in appeal 102 of 1867, her incontinence has disentitled her to a continuance of the bare maintenance then allotted to her. The authorities to which we have referred lead us to the conclusion that she is not so disentitled.

The case of *Rajah Parthee Singh v. Ramee Raj Kower*,⁽³⁾ relied upon by
 (1) 4 Bom. H. C. Rep. 25, A. C. J. (2) 4 Bom. H. C. Rep. 25, A. C. J.
 (3) 20 Calc. W. R. 21, Civ. Bul.

the District Judge, turned upon the question of the consequences of a widow leaving the family house, and not upon the effect of incontinence upon her maintenance. The observations, in that case, of her Majesty's Privy Council as to loss of maintenance in consequence of unchastity, we think, referred to maintenance as a *dies*, not to a starving maintenance, as a bare maintenance has been sometimes denominated. We reverse the decree of the District Judge and restore that of the Subordinate Judge, but direct the parties respectively to bear their own costs of the suit and both appeals.

Note—For the law as administered in the Bengal school on the subject of forfeiture of rights by an unchaste widow, see the Full Bench case of *Key Kolitany v Muneeram Kolita* (13 Beng L R. 1)

1877

HONAMMA

v.

TIMANNA-
BIAT.

[APPELLATE CIVIL JURISDICTION.]

LAKSHMAN DADA NAIK (DEFENDANT AND APPELLANT) *v.* RAM-
CHANDRA DADA NAIK (PLAINTIFF AND RESPONDENT).*

1876

August 2.

RAMCHANDRA DADA NAIK (PLAINTIFF AND APPELLANT) *v.* LAK-
SHMAN DADA NAIK (DEFENDANT AND RESPONDENT) *

Hindu Law—Power of a Hindu to make a will—Unequal distribution of ancestral moveable property—Partition—Evidence of value—Out-standings—Interest

A Hindu governed by the Mitakshara law, who has two sons undivided from him, cannot, whether his act be regarded as a gift or a partition, bequeath the whole, or almost the whole, of the ancestral moveable property to one son to the exclusion of the other.

Ramchandra Dada Nark v. Dada Mahadev Nark (1 Bom H. C Rep, Appx lxxvi) distinguished and explained.

A plaintiff entitled on partition to half the property in the hands of his brother is bound to bring into hotchpot any ancestral property, or property acquired from ancestral funds which may be in his own hands, but is not liable to account for money received by him from his father while living in commensality with him and his brother, the circumstances of such receipt not being of a kind to impute fraud.

* Cross Regular Appeals Nos. 39 and 45 of 1875.

1876
 LAKSHMAN
 DADA NAIK
 v.
 RAM-
 CHANDRA
 DADA NAIK.

Members of an undivided Hindu family making partition are entitled, as a rule, not to an account of past transactions, but to a division of the family property actually existing at the date of partition.

The statement in a will as to the value of the testator's property is no evidence thereof.

The acceptance by one brother of a certain sum of money in satisfaction of his own share in 1868, though it might be evidence of the value of the ancestral property in that year, affords no indication of the value of that property in 1876.

In a partition suit, the Court ought not to order an immediate money payment by the defendant to the plaintiff of his share in the outstanding debts due to the family estate, as if such outstanding debts had been recovered and the money were in the hands of the defendant.

As a member of an undivided Hindu family is not bound to effect a partition by paying a certain sum of money to his co-parcener or co-parceners, the Court, in a partition suit, ought not to award interest on money decreed to be paid by the defendant to the plaintiff.

THESE were cross regular appeals from the decision of Dayaram Mayaram, 1st Class Subordinate Judge at Belgaum. Dada Naik, a Hindu, died on 13th July 1872, leaving him surviving two sons, the present litigants. The property whereof Dada Naik died possessed was ancestral, and consisted both of moveables and immoveables. In 1868 another son, Keshav Naik, had received the sum of Rs. 66,005 in full satisfaction of his share and interest in the moveable family property, but there had never been any partition as between the present litigants and their father in his life-time, though, on account of family quarrels, the plaintiff had never resided with his father and brother since 1858. By his will, dated 13th July 1872, Dada Naik estimated the moveable property in his possession to be worth Rs. 1,32,824-3-9; and stating that the plaintiff had already received more than his share, bequeathed to the defendant the whole of his property, moveable and immoveable, with the exception of one house and a sum of Rs. 500, which he left to the plaintiff.

In October 1872 the plaintiff brought the present suit against his brother, impeaching the validity of their father's will, and claiming a partition of the whole of the family property, both moveable and immoveable. The Subordinate Judge decreed partition, and laid down the principles upon which it was to be made. Against his decision both parties appealed.

The appeals were argued before MELVIN and KEMBALL, JJ.

Marriott, Advocate-General (Acting), and *Telang*, with whom
Shántaráṃ Nárdayen, appeared for the defendant in support
 the will.

1876
 LAKSHMAN
 DADA NAIK

Farran and *Vishnu Ghanasham*, for the plaintiff, *contra*.

v.
 RAM-
 CHANDRA
 DADA NAIK.

The arguments and authorities cited are set forth at length in
 following judgment of the Court, delivered by

MELVILL, J.:—In this suit the parties are brothers, and the
 plaintiff sues for a partition of the family property.

This is not the first litigation of the kind between these parties.
 At the beginning of the year 1861 the plaintiff filed a bill in the
 the Supreme Court at Bombay against his father Dada Naik and
 his brother, the present defendant, to obtain an immediate parti-
 tion of the family estate. That case is reported at 1 Bom. H. C.
 rep., Appx. lxxvi. The defendants demurred to the bill, and
 the demurrer was allowed by Sausse, C.J., and Arnould, J., on the
 grounds that the right of a son to a compulsory partition, if it
 exists at all against the father, does not extend to moveable
 property, and because the only immoveable property, of which a
 partition was claimed, appeared upon the face of the bill not to
 be within the jurisdiction of the Court. The Court considered
 that, as between a father and his sons, in the distribution of
 paternal or other ancestral estate, the father takes the moveable
 property absolutely, or subject only to certain conditions, none of
 which had been broken upon the facts appearing on the record.

On the 30th October 1871 Dada Naik made a will (Exhibit 16).
 In this document he stated that his eldest son Ramchandra (the
 present plaintiff) had misconducted himself, and had also received
 more than his share of the property; and he, therefore, left the
 whole of his property (subject to certain trusts) to his undivided
 son Lakshman (the present defendant), with the exception only
 of the family house at Sháhápúr, in which the plaintiff was living,
 and the sum of Rs. 500, which he bequeathed to the plaintiff.

On the 13th July 1872 Dada Naik died, and three months after-
 wards the plaintiff brought his suit.

Two preliminary objections have been taken to the maintenance

1876
 LAKSHMAN
 DADA NAIK
 v
 RAN-
 CHANDRA
 DADA NAIK

the second, that the former judgment between the parties operates as an estoppel. It is contended that the Supreme Court decided that the father took the ancestral moveable property absolutely, and that it necessarily follows from that decision that the father had the power of disposing of such property according to his pleasure. But we think that all that the Supreme Court was called upon to decide, and all that it intended to decide, was that a son cannot, during his father's lifetime, compel a partition of ancestral moveable property. To that extent only the judgment would operate as a bar, and it cannot so operate in respect of any matter to be inferred by argument from the judgment. On the other hand, the judgment does operate, in the plaintiff's favour, as a bar to the plea of limitation. The plaintiff has all along been in possession of the family house at Sháhápur, and the only other immoveable property sued for is a house at Belgaum, which is stated not to have been built till 1864, and which would not, therefore, be classed with ancestral immoveable property. The suit, therefore, is virtually in respect of ancestral moveable property only ; and as to such property, the Supreme Court held that the plaintiff had no cause of action during his father's lifetime. As between the present parties, therefore, it has been judicially decided that the plaintiff's cause of action did not arise at an earlier date than that of Dada Naik's death, which took place only three months before this suit was brought.

It has also been faintly contended that an actual partition is to be inferred from the admitted fact that the plaintiff lived separate from his family for fourteen years before the present suit, and from the alleged fact that he received certain payments out of the family estate. But it is quite clear that no such partition ever took place. The plaintiff lived separately after 1858, because he had quarrelled with his father ; but in 1861 he sued his father for his share, and he has brought his action again as soon as his father's death left him at liberty to do so. There is no ground whatever for supposing that a settlement of the plaintiff's share was ever made with him, or that he ever renounced his rights.

~~The main question~~ which we have to determine is the validity

admitted. On the other hand the learned Advocate-General has admitted that all the property in dispute must be regarded as ancestral property; and he has further admitted that, on this side of India, a father cannot make an unequal distribution among his sons of such family property as consists of immoveables. The question, therefore, is narrowed to this: can a Hindu, who has two sons undivided from him, bequeath the whole, or almost the whole, of the family moveables to one son, to the exclusion of the other ?

1876
LAKSHMAN
DADA NAIK
v.
RAM-
CHANDRA
DADA NAIK.

The present suit has arisen in the Southern Maratha Country; and there the first place, as an authority, is assigned to the Mitakshara, and a subordinate, though still an important one, to the Mayukha.⁽¹⁾ In *Baboo Beer Pertab Sahee v. Maharajah Rajender Pertab Sahee*⁽²⁾ the Judicial Committee say: "Decided cases, too numerous to be now questioned, have determined that the testamentary power exists" (among Hindus), "and may be exercised, at least within the limits which the law prescribes to alienation by gift *inter vivos*. Accordingly, it has been settled that even in those parts of India which are governed by the stricter law of the Mitakshara, a [Hindu] without male descendants may dispose, by will, of his separate and self-acquired property, whether moveable or immoveable; and that one having male descendants may so dispose of self-acquired property, if moveable, subject perhaps to the restriction that he cannot wholly disinherit any one of such descendants." Their Lordships then refer to, but do not decide, the question whether a father can by will make an unequal distribution amongst his sons of immoveable property, whether acquired or ancestral. That case does not touch the question of ancestral moveable property; nor have we been referred to any case in favour of the father's right to make an unequal distribution of such property, except one, *Sudanund v. Bonomalee*.⁽³⁾ In that case a Bench of the Calcutta High Court said: "By the Mitakshara law applicable to the case, the son has a vested right of inheritance in the ancestral immoveable property; and as the question was raised before us, we must declare that

⁽¹⁾ See *Krishnaji v. Pandurang*, 12 Bom. H. C. Rep. 65.

⁽²⁾ 12 Moore Ind. App. 1; S. C. 9 Calc. W. R. 15 P. C.

1876
 LAKSHMAN
 DADA NAIK
 v
 RAM-
 CHANDRA
 DADA NAIK.

the ancestral property is only that actually inherited from ancestors, and not that which has been acquired or recovered, even though it may have been acquired from the income of the ancestral property; for the income is the property of the tenant for life, to do as he likes with it. On the other hand the father has it in his power to dispose as he likes of all acquired and all personal property." No authority is given for this view of the Mitakshara law; and in a subsequent case between the same parties the first proposition contained in the above extract was most strongly dissented from by another Bench of the Calcutta Court.⁽¹⁾ The case cannot, therefore, be treated as of much authority on the question before us, and we may discuss that question as if it stood clear of judicial decisions. The passages in the Mitakshara bearing upon the question are very fully and carefully discussed by Sir Barnes Peacock in delivering the judgment of the Full Court at Calcutta in *Raja Ram Tewary v. Luchman Pershad*⁽²⁾—a judgment which, it may be observed, proceeds upon a different view of the power of a son, under the Mitakshara, to compel a partition, from that expressed by the late Supreme Court at Bombay in the case already referred to: see also *Laljeet Singh v. Rajcoomar Singh*.⁽³⁾ The author of the Mitakshara, after stating the arguments of his adversaries in paras. 18 to 22 of Chap. I, Section I, proceeds to answer these arguments in paras. 23 to 26; and then in para. 27 he sums up his own conclusions as follows:—"Therefore it is a settled point, that property in the paternal or ancestral estate is by birth, [although] the father have independent power in the disposal of effects other than immoveables, for indispensable acts of duty and for purposes prescribed by text of law, as gifts through affection, support of the family, relief from distress, and so forth." And again in para. 9 of Section V of the same chapter he says: "So, likewise, the grand-son has a right of prohibition, if his unseparated father is making a donation, or a sale, of effects inherited from the grand-father; but he has no right of interference if the effects were acquired by the father. On the contrary, he must acquiesce, because he is dependent." And the reason is stated in the next

⁽¹⁾ See *Sudamuni v. Soorjoo Moonee*, 11 Cal. W. R. 436 Civ. Rul.

⁽²⁾ 8 Cal. W. R. 16 Civ. Rul.

⁽³⁾ 12 Beng. L. R. 373.

para. "Consequently the difference is this: although he has a right by birth in his father's and in his grand-father's property; still since he is dependent on his father in regard to the paternal estate, and since the father has a predominant interest, as it was acquired by himself, the son must acquiesce in the father's disposal of his own acquired property: but, since both have indiscriminately a right in the grand-father's estate, the son has a power of interdiction [if the father be dissipating the property]."

1876

LAKSHMAN
DADA NAIK

v.

RAM-
CHANDRA
DADA NAIK.

Such are the provisions of the Mitakshara, which are similarly stated by Sir Thomas Strange.⁽¹⁾ "Even of *moveables*, if *descended*, such as precious stones, pearls, clothes, ornaments, or other like effects, any alienation, to the prejudice of heirs, should be, if not for their immediate benefit, at least of a consistent nature. They are allowed to belong to the father, but it is under the special provisions of the law. They are his; and he has independent power over them, if such it can be called, seeing that he can dispose of them only for imperious acts of duty and purposes warranted by texts of law; while the disposal of the *land*, whencesoever derived, must be in general subject to their control; thus in effect leaving him unqualified dominion only over *personally acquired*." The Mayukha (Chap. IV, Sec. I, para. 5) limits the power of the father even more strictly—"As for this text: 'The father is master of all gems, pearls, and corals; but neither the father nor the grand-father is so of the whole immoveable estate,' it also means the father's independence only in the wearing and other [use] of ear-rings, rings [&c.], but not as far as gift or other alienation."

The above are the passages of the Mitakshara and Mayukha bearing upon the subject of alienation of ancestral moveable property, and it appears to us that their effect is to prohibit such a gift as that made by Dada Naik to the defendant. We think it impossible to regard such a gift as "a gift through affection," "prescribed by text of law." The gifts which such expression contemplates are probably gifts made by an affectionate husband to his wife (Mitakshara I i 20), the

⁽¹⁾ 1 Str. H. L., 19.

1876 gift of affectionate kindred (Daya-Krama-Sangraha II ii 26),
 LALSHMAN gifts affectionately bestowed on a separated son, who has become
 DADA NAIK divided before his brother's birth (Mitakshara I vi 13 to 15).
 "It would be impossible to hold a gift of the great bulk of the
 RAM- family property to one son, to the exclusion of the other, to be a
 CHANDRA gift prescribed by text of law for the texts which we next quote
 DADA NAIK. distinctly prohibit such an unequal distribution. The author of
 the Mitakshara (Chap. I, Section II, para. 1), after quoting the
 text of Yajnavalkya, "When the father makes a partition, let
 him separate his sons [from himself] at his pleasure, and either
 [dismiss] the eldest with the best share, or [if he choose] all
 may be equal sharers," goes on to say (para. 6)—"This unequal
 distribution supposes property by himself acquired. But, if the
 wealth descended to him from his father, an unequal partition at
 his pleasure is not proper: for equal ownership will be declared."
 And again in para. 14—"When the distribution of more or less
 among sons separated by an unequal partition is legal, or such
 as ordained by the law; then that division, made by the father, is
 completely made and cannot be afterwards set aside: as is declar-
 ed by Manu and the rest. Else it fails, though made by the
 father." The rule is stated by Sir Thomas Strange⁽¹⁾ to be
 that, as to such parts of the estate as have been inherited
 by the father, whether real or personal, land or moveables, the
 division must be strictly equal; and this rule, he adds, is alike
 binding according to the doctrine of every school.

From the above authorities we come to the conclusion that it
 was not within the power of Dada Naik (whether his act be re-
 garded in the light of a gift, or of a partition) to bequeath the
 whole, or almost the whole, of the ancestral moveable property
 to one son, and virtually to disinherit the other. The will must,
 therefore, be set aside, as wholly inoperative.

It follows that the plaintiff is entitled to a partition. How that
 partition is to be made is, under the circumstances of this case,
 a difficult problem: and it cannot be said that it has been satis-
 factorily solved by the Subordinate Judge. The plaintiff is enti-
 tled to one-half of the property in the defendant's hands, but he

is bound to bring into hotchpot any ancestral property, or property acquired from ancestral funds, which may be in his own possession. We will deal with the latter point first. It is admitted that the plaintiff is in possession of the family house at Sháhápúr, valued at Rs. 5,000, and that he carries on some business as a money-lender. There is no evidence that this business is carried on by means of self-acquired funds, and the legal presumption is to the contrary. The defendant further seeks to charge the plaintiff with certain sums received during his father's lifetime. The sum of Rs. 30,000 is entered in Dada Naik's books as paid to the plaintiff between the years 1854 and 1856. The plaintiff denies that he ever received this money; and there is no evidence of the payment, except the entries in the accounts, which alone are not sufficient to charge the plaintiff with liability (Section 34, Indian Evidence Act). Nor, even if the money was really paid, would the plaintiff be liable to account for it: for the payment was made to the plaintiff while he was living in commensality with his father and brother; and even supposing that the father and brother did not take equivalent sums from the common chest, yet "where the enjoyment of what is in common may have been unequal, that of some having been greater than that of others, the shares upon a division are still to be the same, the law taking no account of greater or less expenditure, unless the difference be such as to exclude all idea of proportion, the object entirely selfish, or the circumstances of a kind to impute fraud"⁽¹⁾—none of which latter circumstances are shown or alleged in the present case. Moreover, if the plaintiff were called on to account for this Rs. 30,000, the defendant would have to account not only for all that he received while the family was living in commensality, but for everything which he has expended since 1858, during which time he has been supported out of the family property, while the plaintiff has received nothing. Some evidence has been imported into the case, in regard to a sum of Rs. 45,000 said to have been paid by Dada Naik to the plaintiff in 1859. The circumstances connected with this payment seem to have been these: Dada Naik had lodged a complaint of robbery against the plaintiff and two other persons before Major Jameson, Cantonment

1876

LAKSHMAN
DADA NAIK
v.
RAM-
CHANDRA
DADA NAIK.

(1) 1 Str. II, L 200.

1876 Magistrate at Belgaum. The plaintiff and the two other persons were consequently arrested, but shortly after released: and they then brought actions against Major Jameson in the Supreme Court at Bombay. These actions were compromised by the payment of Rs. 45,000: but whether Dada Naik supplied the money, or what portion of it was received by the plaintiff, is not clearly shown. Nor is it, in our opinion, at all material. The money was certainly not paid to the plaintiff as part of his share in the family property, but apparently as compensation for an injury inflicted upon him by his father. Moreover, we think that members of an undivided Hindu family, when making a partition, are entitled, as a rule (and there is nothing in the present case to make it an exception to the rule), not to an account of past transactions, but to a division of the family property actually existing at the date of partition.—See *S. M. Rangannam v. Kasinath*.⁽¹⁾

The plaintiff, then, is entitled, upon bringing into hotchpot the family property in his own possession, to obtain a half share of that property, and of all property actually in possession of the defendant. But unfortunately neither party is in a position to prove what the other has. The Subordinate Judge has made no reference to the plaintiff's property, and he has estimated the value of the defendant's property in a very unsatisfactory manner. In Dada Naik's will the moveable property is stated to be worth Rs. 1,32,824-3-9; and as it appeared that in 1868 Keshav Naik, another son of Dada Naik, accepted the sum of Rs. 60,005 as his one-third share of the property, the Subordinate Judge thought that it was not likely that Dada Naik left more than was stated in the will; and he accordingly accepted that statement as correct, and awarded to the plaintiff one-half of the sum so stated in the will, as the value of his share of the moveable property. To this he added Rs. 5,000, as the difference in value between the two houses, and awarded to the plaintiff altogether Rs. 71,412, or moveable property of that value, and further directed that the sum so awarded should bear interest from the date of suit to the date of payment. To this award several objections have been taken by the defendant, viz., that the statement in the will

is not evidence; that if Keshav Naik's acceptance of a certain sum in 1868 be evidence of the value of the property in that year, it affords no indication of the value of the property now; that the assets of the banking business, which forms the most important part of the property, consist in a great measure of outstanding debts; that the Subordinate Judge, in ordering an immediate money payment by the defendant to the plaintiff, treated such debts as if they had been recovered, and the money were in the defendant's hands; and, finally, that, as the defendant is not, and never was, bound to effect a partition by paying to the plaintiff a certain sum of money, the award of interest cannot be sustained. We think that all these objections are good and valid objections, and that we must endeavour to put the partition on some other basis than that adopted by the Subordinate Judge. The only immoveable property consists of two houses, one of which has been for years occupied by the plaintiff, the other by defendant. The house at Sháhápúr must be assigned to the plaintiff, and that at Belgaum to the defendant; and as the defendant does not dispute the plaintiff's valuation of the house at Belgaum at Rs. 14,000, and neither party disputes the Subordinate Judge's valuation of the Sháhápúr house at Rs. 5,000, the defendant must pay to the plaintiff, on account of the difference of value, the sum of Rs. 4,500. Each party must be required to give in an inventory of all furniture, jewels, and other moveables in his possession; and these (with the exception of such moderate amount of clothes and jewels as are usually worn by the members of the family) must be equally divided, either in specie, or by a valuation and money adjustment. It will, of course, be competent to either party to prove the existence of any moveables not entered in the inventories; and, if necessary, a Commissioner can be appointed, with power to enter the houses of both the parties, and make an inventory and valuation of the property therein contained. Finally, we have to consider the extensive trade and banking business carried on by the defendant, and that carried on on a smaller scale by the plaintiff. If there were any hope that the parties would be able and willing to carry on business harmoniously, and with mutual confidence, the most satisfactory way of making the partition would be to declare the parties to be

1876

LAKSHMAN
DADA NAIK
2
RAM-
CHANDRA
DADA NAIK

1876
 LAKSHMAN
 DADA NAIK
 v
 RAM-
 CHANDRA
 DADA NAIK.

henceforth not members of an undivided Hindu family, but partners in trade; and to direct that the plaintiff's business at Sháhápur and the defendant's business at Belgaum and Bombay should be united into one common firm, and carried on by both parties on the footing of an ordinary partnership. It would probably be most convenient that the existing system of management should not be disturbed; that the plaintiff should continue to manage the Sháhápur business, and the defendant that at Belgaum and Bombay, the profits being divided from time to time in equal proportions. That, as it appears to us, would be the most convenient mode of partition; but it would manifestly be useless for this Court to constitute such a partnership, unless the parties agreed to enter into such a relation with one another, because either party, who might be dissatisfied with the arrangement, might at once come into Court, and claim a dissolution of the partnership, and the settlement of the differences between the parties would then be no further advanced than at the present moment. If the parties will not accept such an arrangement as this, and if the defendant will not do what would be still more satisfactory, viz, come to a private settlement with the plaintiff and pay him the ascertained value of his share (in the same manner as the claims of Keshav Naik and other members of the family were settled in former years), then the only alternative is to order an account between the parties, and a division upon the footing of such account. It appears that the defendant's account books have been considerably damaged by white ants while in the custody of the lower Court; and the loss of these books may, as he says, render it more difficult for him to recover some of his outstanding debts. But he has been carrying on his business for some time without these books; and he must certainly be in a position to show what are the assets and liabilities of his business, as they exist at the present moment. The decree, therefore, which we shall make is the following :—This Court reverses the decree of the Subordinate Judge, and declares that the plaintiff and defendant are entitled each to a separate half share in all the property in the possession of either of them, and directs that partition be made in the manner hereinafter mentioned, that is to say, that of the two houses in the place mentioned, the house at Sháhápur be assigned to the

plaintiff, and the house at Belgaum to the defendant, and that the plaintiff do receive, in respect of the difference in value between the two houses, the sum of Rs 4,500 : and in respect of the furniture, jewels, and other specific moveables, this Court directs that the Court below shall proceed to inquire and determine what property there is of this description in the possession of either of the said parties, and to divide the same in the manner which is usual in the partition of moveable property; and in respect to the trade and banking business carried on by the plaintiff at Sháhápúr, and by the defendant at Belgaum and Bombay, this Court orders and directs that each of the said parties shall forthwith produce and bring into the said lower Court all accounts, books, books of account, bonds, mortgages, agreements, papers, and other documents whatsoever in his possession, custody, or control, or in the possession of any other person or persons in trust for him, relating to such trade and business, in order to enable the said lower Court to ascertain and determine what is the amount of moneys in the hands of either party, and what is the amount of the debts due to and by either party on account of such trade and business; and thereupon that the said lower Court do direct that all moneys in the hands of either party be paid into Court, and do make payment therefrom of all debts due by either party on account of his said trade or business, and do appoint a receiver or manager, under Section 92 of the Civil Procedure Code, to recover or sue for outstandings due to either party or to pay the same into Court, and do from time to time divide the moneys so paid into Court between the said parties in equal shares. And this Court directs that the costs of this suit and appeal be paid out of the estate, but authorizes the said lower Court to direct that either of the said parties, who may vexatiously or improperly delay or obstruct the execution of this decree, shall pay the costs occasioned by any such vexatious or improper delay or obstruction

1877.
LAKSHMAN
DADA NAIK
v
RAMCHANDRA
DADA
NAIK.

[APPELLATE CIVIL JURISDICTION.]

Before Sir M. R. Westropp, Kt, Chief Justice, and Mr. Justice
McNeill.

1877.
February 1.

KHANDU DUBLADAS (PLAINTIFF AND APPELLANT) v TARACHAND
AMARCHAND (DEFENDANT AND RESPONDENT).*

*Act XIX. of 1843—Act XX. of 1866, Section 50—Registration—Priority
—Mortgage—Account—Res judicata—Notice.*

A mortgage deed registered under Act XX. of 1866 is not thereby entitled to priority over a mortgage deed which might have been, but was not, registered under Act XIX. of 1843, in cases where the consideration for the rival deeds exceeds Rs. 100. *Maleshappa v. Bassappa* (1 Bom. H. C. Rep. 10), *Harnamgir v. Spiers* (2 Bom. H. C. Rep. 204), and *Parabhudas v. Dhondu* (2 Bom. H. C. Rep. 222) distinguished.

Quære.—Whether in the case of instruments executed for a consideration less than Rs. 100, Sec 50 of Act XX. of 1866 would operate to give priority to the deed registered under that Act over the deed which might have been, but was not, registered under Act XIX of 1843.

THIS was a special appeal from the decision of H. Batty, Extra Assistant Judge at Dhulia, reversing* the decree of the 2nd Class Subordinate Judge at Yawal.

The plaintiff, Khandu, sued to recover possession of a house and site, alleging that these premises had been mortgaged to him by one Rághu Rámji for Rs. 312-8-0 on 26th July 1860, that he had obtained a decree against Rághu on this mortgage, and at a sale in execution of that decree had purchased the property himself on 26th March 1873. The defendant pleaded, among other things, that the property claimed had been mortgaged to him by the same Rághu Rámji on 20th October 1869; that his mortgage had been duly registered, and, therefore, was entitled to prevail over the unregistered mortgage of the plaintiff. He also alleged that he had purchased the property on 7th June 1872 in execution of a decree obtained by him against Rághu on the mortgage of 20th October 1869. The Subordinate Judge, after having taken evidence on the issues framed, found both the mortgages to be *bonâ fide* and for good consideration, held the mortgage of the plaintiff to be entitled to preference, and made a decree in the plaintiff's favour. In appeal the Assistant Judge reversed that decree, and held the defendant's mortgage entitled

* Special Appeal No. 188 of 1876.

to priority on the authority of *Maleshappa v. Bassappa*,⁽¹⁾ *Harnamgir v. Spiers*,⁽²⁾ and *Parabhudás v. Dhondu*.⁽³⁾ 1877.

Gokuldás Kahandás for the appellant :—The plaintiff's mortgage was executed when Act XIX. of 1843 was in force, while the defendant's mortgage was executed under Act XX. of 1866. The question of priority, therefore, did not arise in the case.

KHANDU
DUBLADÁS
v.
TARACHAND
AMARCHAND.

Shántarám Náráyan for the respondent.

WESTROPP, C.J.:—The plaintiff's and defendant's mortgages were both for sums exceeding Rs. 100. Act XX. of 1866, under which the defendant's mortgage was registered, makes no provision in such cases for priority of deeds of sale of mortgages registered under that Act over deeds of sale or mortgages which might have been, but were not, registered under Act XIX. of 1843. We cannot, therefore, adopt the view taken by the Assistant Judge of the consequence of the non-registration of the plaintiff's mortgage which was executed on the 26th July 1860, and was, therefore, registrable under Act XIX. of 1843, the defendant's mortgage having been executed on the 20th October 1869, and registered under Act XX. of 1866.

The authorities relied upon by the Assistant Judge were cases in which *all* of the conflicting documents were registrable under Act XIX. of 1843, and, therefore, are inapplicable to the present case, in which one of the mortgages only was registrable under that Act, and the other was registrable under Act XX. of 1866. The two latter of those cases—*Harnamgir v. Spiers* and *Parabhudás v. Dhondu*—are (on the question as to the effect of possession) the subject of comment in *Balarám Nemchand v. Appa Dulu*.⁽⁴⁾

Whether, in the case of instruments executed for a consideration under Rs. 100, where the earlier document was registrable under Act XIX. of 1843, and the latter document was so under Act XX. of 1866, the 50th Section of that Act would give to the latter document, if registered, priority over the earlier document, if unregistered, is a question which does not present itself here, and on which we offer no opinion.

⁽¹⁾ 1 Bom. H. C. Rep. 10.

⁽²⁾ 2 Bom. H. C. Rep., 1st Ed., 213, 2nd Ed., 204.

⁽³⁾ 2 Bom. H. C. Rep., 2nd Ed., 222.

⁽⁴⁾ 9 Bom. H. C. Rep. 121. See pp. 138, 139, and 141.

1877 The plaintiff, the first mortgagee, is now entitled to recover possession of the house and site, the subject of this suit, and to hold the same as against the defendant, the second mortgagee, and we decree that such possession be forthwith given to the plaintiff; but we will give liberty to the defendant to redeem the same on payment of the sum which may be found now due to the plaintiff upon an account duly taken in respect of the mortgage to him by Rághu of the 26th July 1860. The decree in the plaintiff's suit (No. 1198 of 1872) against Rághu is not binding upon the defendant, who, though he became a purchaser on the 7th June 1872, was not made a party to that suit, which seems to have been instituted on or about the 17th July in the same year. Therefore the account taken in that suit is not conclusive upon the defendant.

KHANDU
DUBLADÁS
v.
TÁRÁCHAND
AMARCHAND

The defendant must, within one calendar month after this decree has been notified to him, inform the subordinate Court whether or not he intends to redeem, and, if so, whether he demands that an account should be taken of what is due to the plaintiff. If he do within that time demand that such account should be taken, the subordinate Court should, within the period of three calendar months from such demand, take and complete such account; and if the defendant do, within three calendar months (from the time the amount found due on such account to the plaintiff is notified by the subordinate Court to the defendant), pay to the plaintiff that amount and the costs of the suit and of the regular appeal, the defendant shall be at liberty to redeem and recover the house and site (the subject of this suit) from the plaintiff; but if the defendant do not pay such amount and such costs to the plaintiff within the last-mentioned period of three calendar months, the defendant is to be for ever barred and foreclosed from redeeming the said house and site from the plaintiff. The parties respectively are to bear their own costs of this special appeal.

Decree reversed.

[APPELLATE CIVIL JURISDICTION.]

Before Sir M. R. Westropp, Kt., Chief Justice, and Mr. Justice
Melvill.

RAMCHANDRA MANKESHWAR (PLAINTIFF AND APPELLANT) v.
BHIMRAV RAVJI AND ANOTHER (DEFENDANTS AND RESPONDENTS).*

1877
March 1.

Bombay Act I. of 1865, Section 2, Clause (j), and Sections 36 and 42, Clause
1st—*Razinámá*—Occupant—Mortgage of *Mirási* land—Interest.

D., widow of a Hindu *Mirásdár*, by a duly-registered deed, dated the 24th of November 1869, mortgaged the *Mirási* land of her deceased husband to R. M. for Rs 150. Subsequently, on the 5th July 1872, D. executed a *razinámá* of the land in a favor of R. G.

Held that the mortgage bound D's estate in the *Mirási* land as a Hindu widow : that, whether the property is regarded as *Mirási*, or as that of an ordinary occupant, it is transferable under Section 36 of Bombay Act I. of 1865 ; that when D. executed the *razinámá*, there was nothing left in her to relinquish or otherwise deal with more than the equity of redemption ; that, consequently, R. G. took nothing by the *razinámá* executed in his favor by D. except this equity of redemption.

Turachand v. Lakshman (I. L. R. 1 Bom. 91) distinguished.

The distinction between the present and the case of a purchase at a sale for arrears of Government land revenue is, that at such last-mentioned sale, the purchaser takes the land discharged of all encumbrances, inasmuch as the Government land revenue is the paramount charge upon the land.

Interest allowed not exceeding the principal, following the rule of Damdupat.

THIS was a special appeal from the decision of E. Cordeaux, Assistant Judge at Sholápur, in the district of Poona, amending the decree of Rávji Govind, 2nd Class Subordinate Judge at Bársi.

Ramehandra Mankeshwar brought this suit against Deoku (defendant No. 1), Bhimráv Rávji (defendant No. 3), Rávji Girdhar (defendant No. 4), and Vitto Balla, the lessee of Bhimráv (defendant No. 2). The plaintiff sought in this suit to recover Rs. 279, due on a mortgage bond, for Rs. 150, with interest at 2 per cent. per mensem, executed by Deoku on the 24th November 1869, and prayed for a decree against Deoku personally or against the mortgaged property. Deoku (defendant No. 1) pleaded that the mortgage was fraudulent and without consideration, and that she had relinquished the land by a *razi-námá* in favour of Bhimráv Rávji (defendant No. 3), under date

* Special Appeal No. 378 of 1876

1877, the 5th July 1872. Bhimráv and Rávji (defendants Nos. 3 and 4) answered that the land belonged to defendant No 4 as *Jughadar*, and was relinquished by defendant No. 1, and entered in the name of defendant No 3, in the revenue books, and that, therefore, the plaintiff could not claim to recover the mortgage debt by the sale of the land. The Subordinate Judge awarded the claim against Deoku (defendant No. 1) personally, and, in default of payment, ordered the sale of the mortgaged property. In appeal, which was preferred by defendants Nos. 3 and 4 (Bhimráv and Rávji), the Assistant Judge, on the authority of *Tarachand v. Lakshman*,⁽¹⁾ held that the lien of the plaintiff on the land as mortgagee became extinct when Deoku (defendant No. 1) presented her *razmamá*; and amended the decree of the first Court by making a decree for the payment of the money only against Deoku personally. The plaintiff preferred a special appeal, and of the respondents, Bhimráv and Rávji only appeared.

RAMCHAN-
DRA
MANKESH-
WAE
v.
BHIMRÁV
RAVJI AND
ANOTHER.

Bharavnáth Mangesh for the appellant:—The Assistant Judge was wrong in holding that the person in whose favour a *Mirásdár* resigns his land does not take it subject to a mortgage created by the *Mirásdár* before the date of his *razmamá*. The case relied upon by the Assistant Judge in support of his decision does not apply. In that case, there was no mortgage executed by the *Mirásdár* prior to the date of the *razmamá*.

Shántarám Náráyan for the respondents:—Deoku was an occupant of the land in dispute, as defined by Section 2, Clause (j), of Bombay Act I. of 1865, being responsible to Government for payment of the assessment due on it. As such occupant she was at liberty to relinquish her rights of occupancy under the provisions of Section 42, Clause 1. When Deoku mortgaged the land to the plaintiff, he ought to have got his name entered in the revenue books as occupant. By omitting or neglecting to do so, the plaintiff placed her in a position to resign the rights of occupancy in favor of any person she chose. By this omission or neglect on the plaintiff's part, he necessarily ran the risk of being deprived of his lien on the land by Deoku executing a *razmamá* in favor of a new occupant. Supposing the assessment payable on this land had fallen into arrears, and the land had been sold for

such arrears the purchaser would have taken it free of all encumbrances as held by this High Court in *Abdul Gani v. Krishnaji*,⁽¹⁾ *Gundo v. Mardan*,⁽²⁾ and *Ghelabhar v. Pranguan*.⁽³⁾

The judgment of the Court was delivered by

WESTROPPE, C.J. :—The case *Tarachand v. Lakshman*⁽⁴⁾ cited by the Assistant Judge is not any authority for his decision. There was not in that case any mortgage or other specific lien on the land created by the *Musadar*, Bhagu, or his predecessors in title, previously to his execution of the *razinámá* in favour of Lakshman, the new occupant. The learned pleader for the respondents, in the present case, relied upon Bombay Act I. of 1865, Section 2, Clause (j), and Section 42, Clause 1st, as sufficient to support the title of the defendant Bhimráv Rávji, in whose favour Deoku (the first defendant) executed the *razinámá* of the 5th July 1872 to the *Jahagirdár* Rávji Girdhar, father of Bhimráv Rávji. But there is nothing in Section 42 which would enable Deoku to relinquish more of the *Mirásí* estate than was left in her at the time of the *razinámá*. She had already, on the 24th November 1869, by a duly-registered deed, mortgaged the lands in dispute to the plaintiff Ramchandra Mankeshwar for Rs. 150; that mortgage was *pro tanto* an assignment of her *Mirásí* interest, and that she could make such an assignment has not been disputed in this case. How far it would bind her husband's heirs is not a question now before us. It would, at all events, bind her estate in the lands as a Hindu widow; ⁽⁵⁾ whether we regard the *watan* or the property as *Mirásí* or as that of an ordinary occupant (*Khatedar*), it was transferable (Bombay Act I. of 1865, Section 36); and when she had executed the duly-registered mortgage of 1869, there was nought left in her to relinquish or otherwise deal with than the equity of redemption. Bhimráv Rávji, therefore, by Deoku's execution of the *razinámá* in his favour took nothing except the equity of redemption. The *Jahagirdár* admitted him in virtue of that *razinámá*, and not otherwise. This was not a case of a purchase at a sale for arrears of Government land revenue ⁽⁶⁾. At such a sale the purchaser, inasmuch as the Government land revenue is

1877 •

RAM-
CHANDRA
MAN-
KESHWAR
v
BHIMRÁV
RÁVJI AND
ANOTHER.

(1) 10 Bom. H. C. Rep. 416.

(2) *Ibid.* 419.

(3) 11 Bom. H. C. Rep. 218.

(4) I L R. 1 Bom. 91.

(5) See 2 Bom. H. C. Rep. 313, and 8 Bom. H. C. Rep. 37, A. C. J.

(6) As to *Jahagirdárs* and *Indamdárs*, see 11 Bom. H. C. Rep. 37.

1877.
 RAM-
 CHANDEA
 MAN-
 KESHWAR
 v.
 BHIMRÁV
 RÁVJI and
 ANOTHER.

the paramount charge upon the land, takes the land discharged of all incumbrances: *Abdul Gani v. Krishnaji*, ⁽¹⁾ *Gundo v. Mardan*, ⁽²⁾ *Ghelabhai v. Pranjan*. ⁽³⁾ In the present case Bhimráv Rávji, if he had taken the trouble to search the register [as a prudent purchaser or intended assignee would have done], would have learned that the widow's interest in the lands was burdened with the plaintiff's mortgage. We reverse the decree of the Assistant Judge, and direct that the defendant Deoku do pay to the plaintiff the sum of Rs. 150, *i.e.*, principal money, together with interest at the rate of 2 per cent. per mensem from the 24th November 1869 until payment: provided, however (having regard to the rule of *Damdapat*), that the whole sum payable by her in respect of the said principal money and interest shall not exceed Rs. 300 in the whole, and it is further directed that all of the defendants shall pay to the plaintiffs his costs of this suit, and that the defendants Bhimráv Rávji and Rávji Girdhar do pay to the plaintiff his costs of both appeals, and it is also directed that in default of payment of the said principal money and interest and costs of this suit by the said defendant Deoku, or of payment of the same and of the costs of both appeals by the defendant Bhimráv Rávji (in his capacity as assignee of her equity of redemption) within 6 calendar months from the 1st day of March 1877, the estate of the widow Deoku in the land in the plaint mentioned shall be sold by public auction, and, after deduction of the expenses of sale, the proceeds of sale shall be applied in discharge of the said principal money and interest (not exceeding Rs. 300 as aforesaid) and the costs of this suit and of both appeals, and the defendants in this suit shall be for ever barred and foreclosed from redeeming the said lands, and the residue, if any, of the said purchase money left after payment of the said principal, interest, and costs shall be made over to the defendant Bhimráv Rávji. The defendant Deoku and the defendant Vitto Balla are respectively to bear their own costs of the suit, and the defendants Bhimráv Rávji and Rávji Girdhar are to bear their own costs respectively of the suit and of both appeals.

Decree reversed.

[APPELLATE CIVIL JURISDICTION.]

1877.
March 5*Before Mr. Justice Melvill and Mr. Justice Kcmball.*RANCHODDAS DAYALDAS (PLAINTIFF, APPELLANT) *v.* RANCHOD-
DAS NANABHAI (DEFENDANT, RESPONDENT).**Bhāgdār and Narvādār—Bombay Act V. of 1862, Sections 1 and 3—Un-
recognized portion mortgaged before the passing of the Act—San mort-
gage—Court's sale.*

The plaintiff, in 1874, sued on a *San* mortgage, dated 15th November 1861, *i.e.*, five months before the passing of Bombay Act V of 1862, to recover a sum of money by sale of the mortgaged property, which formed part of a *bhāg* in a *Bhāgdār* village, which *bhāg* the defendant had purchased at a Court's sale subsequent to the date of the mortgage.

Held (assuming Section 1 of the Act to apply) that it does not bar the right of action; that, therefore, a Civil Court would be bound to make a decree, even though it might anticipate that Section 1 of the Act would stand in the way of the execution of that decree.

Semble, that, after a decree has been passed against a portion of a *bhāg*, the Collector might recognize such portion as a division of the *bhāg*, if assured that justice required that the decree should be executed.

Held, further, that no retrospective operation can be given to Section 1 of the Act, so as prejudicially to affect existing rights. The words "attachment or sale by the process of any civil court," used therein, were intended to prevent attachment and sale under simple money decrees, and not to prevent the sale of mortgaged property in satisfaction of a valid mortgage.

Held, also, that the purchaser at a Court's sale buys only the right, title, and interest of the debtor, burdened with all valid liens, such as a previous *San* mortgage. *Mathuradas v. Kāla* (7 Bom. H. C. Rep. 24, A. C. J.) and *Chintaman v. Shivrām* (9 Bom. H. C. Rep 304) followed.

THIS was a special appeal from the decision of H. Birdwood, Judge of Surat, reversing the decree of the 2nd Class Subordinate Judge of Ankleswar.

The plaintiff sued in 1874 on a mortgage deed, dated 15th November 1861, to recover Rs. 110 from the mortgaged property of a deceased *Bhāgdār* named *Vishrām*, from his heirs, and from *Ranchoddās Nānābhāi*, the purchaser in possession at a sale by the Court, at a date subsequent to the mortgage of the whole of *Vishrām's bhāg* of which the property mortgaged formed a part.

Vishrām's heirs did not defend the suit. The purchaser *Ranchoddās Nānābhāi* answered that he had no knowledge of the

* Special Appeal No. 364 of 1875

1877. mortgage, and that the plaintiff's suit was barred by Bombay Act V. of 1862.

RANCHODDÁS
DAYÁDÁS

v.
RANCHODDÁS
NÁNÁBHÁI.

The Subordinate Judge awarded the claim, finding the mortgage proved, and holding that under the Bhágdári Act, Section 1, there was no objection to the enforcement of the claim against the mortgaged property, as the bhág had already been dismembered before the passing of the Act, and defendant Ranchoddás Nánábhái's purchase was long after it, that is, in October 1873.

The Judge, in appeal, was of opinion that the claim could not be enforced against the mortgaged land. He said: "I cannot find that the bhág which the defendant purchased had been so dismembered before Bombay Act V. of 1862 came into force, by the mortgage of a portion of it to the plaintiff, that Section 1 of the Act could not be applied to it. It is admitted that the mortgaged portion is a portion of the bhág; the bhág, therefore, was property for the protection of which the Act was passed. And, after the Act had become law, no portion of Vishráam's bhág was liable to attachment or sale by the process of any civil court. Such protection, it seems to me, is extended to all Bhágdári land, whether it had been mortgaged or not before the Act came into force."

Nagindás Tulsidás for the plaintiff, the special appellant:—The mortgage to the plaintiff was before the passing of the Bhágdári Act, which, therefore, does not apply to this case. No retrospective effect can be given to it without the express command of the Legislature. The Act does not bar the cognizance of a suit in respect of an unrecognized portion. It would be highly inequitable to deprive the plaintiff of the benefit of his security in this case, for the dismemberment of the bhág had taken place before the passing of the Act. The defendant's purchase was subject to the plaintiff's *San* mortgage, he being a purchaser at the Court's sale.

Honourable Rao Sahab V. N. Mandlik, Acting Government Pleader, was heard on behalf of the Collector, who was not made a party, but to whom a notice was issued by the Court, calling on him to state any objections he might have to urge against the plaintiff's claim. He contended that the Act was passed to preserve the permanency of Bhágdári features, and that a decree in

the plaintiff's favour would defeat the object of the Legislature. Such a decree could not be enforced, and should not be passed.

1877. "

No one appeared for the defendant.

The judgment of the Court was delivered by

RANCHODDÁS
DAYÁLDÁS
v.
RANCHODDÁS
NÁNÁBHÁI.

MELVILL, J.:—In this case the plaintiff, a mortgagee, sues to recover three instalments of his debt by the sale of the mortgaged property. The property is a portion of a share in a Bhágdári village, and it may be taken as admitted that it does not form what is called, in Bombay Act V. of 1862, a recognised sub-division of such share. Under these circumstances the District Judge has held that he is precluded by Section 1 of Bombay Act V. of 1862 from making a decree in the suit. Section 1 is as follows:—

"No portion of a bhág or share in any bhágdári or narwadári village, other than a recognised sub-division of such bhág or share, shall be liable to seizure, sequestration, attachment, or sale by the process of any civil court, and no process of such court shall be enforced so as to cause the dismemberment from any such bhág or share or recognised sub-division thereof of any homestead, building-site (Gubhan), or premises appurtenant or appendant to such bhág or share or recognized sub-division thereof."

The first observation which is suggested by this section is that, even if the District Judge were right in applying it to the present case, it does not appear to preclude the hearing of the suit, or the making of a decree. It relates only to the issue and enforcement of process of execution. The Act prohibits mortgages of fractional portions of a bhág subsequently to the date of the Act (Section 3), but it does not invalidate such mortgages made previously to that date, nor does it take away the right of action in respect to them. As, therefore, the cognizance of the suit is not barred by the statute, we apprehend that we should be bound to make a decree, even though we might anticipate, as the District Judge has done, that Section 1 of the Act would stand in the way of the execution of that decree. No doubt a Court would be unwilling to make a decree which it could not execute; but we think that we would be bound to do so, if the law gave the Court cognizance of the suit. Moreover, it seems to us that even if Section 1 of the Act be applicable, it does not necessarily follow

" 1877 that a decree made in this suit would be incapable of execution.
 RANCHODDÁS The term "recognized sub-division" is nowhere defined in the
 DAYÁLDÁS Act. *Non constat* that the Collector or the proper authority
 v. might not be induced to recognize the land in dispute as a sub-
 RANCHODDÁS division if he were made aware that the plaintiff held a decree
 NÁNÁBHÁI. which ought in justice to be executed, and which could not other-
 wise be executed. Nor is it inconceivable that the Legislature, if
 made aware that the Act was productive of hardship which had
 not been contemplated, might make provision for the enforce-
 ment of decrees founded upon rights which were in existence be-
 fore the passing of the Act. But in any case we think that the
 plaintiff (if otherwise entitled) ought to have a decree in this
 suit, whether such decree is worth much, or little, or nothing.

But we are prepared to go further, and to hold that Section 1
 of Bombay Act V. of 1863 would not apply to the present case.
 Before coming to this conclusion we thought it advisable that
 an opportunity should be given to the Collector to be heard in the
 matter; and notice has accordingly been given to him, and we
 have had the benefit of hearing the Government Pleader in his
 behalf.

The mortgage to the plaintiff was made on the 15th November
 1861, or about five months before Bombay Act V. of 1862 was
 promulgated. To hold that the Act deprives such a mortgagee of
 the power of making his security available in the only manner in
 which in many cases it can be made available, would be to give a
 retrospective operation to the law, and to impute to the Legislature
 the intention of prejudicially effecting vested rights. There is a
 strong legal presumption against such an intention, and it is not
 to be imputed, unless the terms of the Act clearly and unambig-
 uously show that such was the intention. A careful consideration
 of all the provisions of Bombay Act V. of 1862 leads us to the
 conclusion that the words "attachment or sale by the process of
 any civil court" in Section 1 were intended to prevent attachment
 and sale under simple money decrees, and not to prevent the sale
 of mortgaged property in satisfaction of the mortgage debt. If
 the latter had been the intention, it is to be presumed that the
 Legislature would have taken away the right of action, and so

civil courts in the absurd dilemma of being obliged by law to hear a useless suit, and to pass a decree incapable of execution. Again, it is clear that the terms of Section 1 cannot, under any construction, preclude the execution of a decree for the foreclosure of a previously existing mortgage; and yet foreclosure, equally with sale, would operate to dismember a bhág, and so defeat the intention of the Legislature, if the intention were to preserve the mortgaged property from alienation under any and all circumstances. It is not to be presumed that the Legislature, if it wished to defeat vested rights, would have closed one door against the enforcement of those rights, and have left open another mode of access to precisely the same results. On these grounds, viz., that "out of respect to the Legislature," as said by Lord Chancellor Kent in *Dash v. Vankleek*,⁽¹⁾ it must not be presumed that it intended what would be both unjust and illogical, and that "the reason and intention of the law-giver will control the strict letter of the law, when the latter would lead to palpable injustice, contradiction, and obscurity,"⁽²⁾ we are of opinion that we ought not to give to Section 1 of Bombay Act V of 1862 a retrospective operation, so as prejudicially to affect existing rights; and we, accordingly, overrule the decision of the District Judge on this point.

The respondent is the purchaser, at a sale under a decree, of the entire bhág, of which the property in dispute forms a portion. He does not appear to dispute the genuineness of the plaintiff's mortgage. He denies that the plaintiff has ever had possession; but even if he be right in this contention, his liability is not lessened. The plaintiff's mortgage is a *San* mortgage; and the respondent, as purchaser at an auction sale, bought only the right, title, and interest of the debtor burdened with all valid liens created by him; *Mathuradás v. Káha*,⁽³⁾ *Chintaman v. Shivrám*.⁽⁴⁾ The questions of possession and of notice do not, therefore, arise, and we are in a position to dispose of the case without a remand.

We reverse the decree of the District Court, and restore that of the Subordinate Judge, with costs on the special respondent throughout.

Decree reversed.

(1) 7 Johns. 477.

(2) 1 Kent Com. 462.

(3) 7 Bom. H. C. Rep 24 A. C. J.

(4) 9 Bom. H. C. Rep. 304.

[APPELLATE CIVIL JURISDICTION.]

1877
March 5.

Before Mr. Justice Melvill and Mr. Justice Kimball.

KEVAL KUBER AND ANOTHER (PLAINTIFFS, APPLICANTS) v. THE TALUKDARI SETTLEMENT OFFICER AND GAGUBHAI ABHE-SANGJI TALUKDAR (DEFENDANTS, RESPONDENTS).*

Talukdār Act, Bombay Act VI of 1862—Rent-free land—Right to levy assessment—Limitation.

The Talukdār Settlement Officer having assessed rent-free land, on the ground that it had been granted for service, and that service was no longer required,

Held that this was not a sufficient defence to an action by the holder of the land, it not being shown that by the terms of the grant (assuming that there had been a grant of an estate burdened with service) the estate was determined by the remission of the service.

Held further that if the grant was the grant of an office remunerated by the use of land the right to assess was barred, by the possession of a person, not claiming under the grantee, for a longer period than twelve years after the right to resume accrued, under Act IX of 1871, Section 29 and Art 130, Schedule II.

THIS was a special appeal from the decision of W H Newnham, Judge of the district of Ahmedabad, confirming the decree of J. W. Walker, Assistant Judge.

The facts of the case are as follows:—

The plaintiffs in 1874 sued to recover the amount of rent imposed in 1871-72 by the Talukdār Settlement Officer, proceeding under Bombay Act VI. of 1862, upon a piece of land. They alleged in the plaint that the land belonged to Galā Tejá and Parshotam Tejá, by whom it was mortgaged to the plaintiff's father, Kuber, in 1859-60; a further charge was placed upon it in 1861-62; and, finally, in 1865-66 it was sold to the plaintiffs. The plaintiffs also prayed for cancelment of the Talukdār Settlement Officer's order imposing rent.

The Talukdār Settlement Officer was at first the only defendant in the cause; and he answered that the plaintiffs were not the owners of the land; that the land belonged to the Talukdār of Gāngad, whose estate was now in his charge; that it was granted to one Jiva Karshan, at a date unknown, in return for services as a cook; that Jiva performed service and cultivated the land till

* Special Appeal No. 68 of 1876

1834; that Jiva did in 1853 and was succeeded by Morar Ganesh. That the services of cook were no longer required by the Tálukdár, and, therefore, under Bombay Act VI. of 1862, the Tálukdári Settlement Officer had every right summarily to impose the rent he had fixed.

The Tálukdár of Gángad, Ganbhai Abhesangji, was subsequently added as a defendant to the suit, and he made a similar defence.

The Assistant Judge of Ahmedabad, who tried the suit, rejected the plaintiff's claim, for the reasons, among others, that the Talukdari Settlement Officer was perfectly justified in deciding summarily that land was not alienated and hable to pay rent in lieu of service, and that, even if this was not so, the plaintiffs had failed to prove their title.

Gokuldas Kahándas Parekh for the plaintiffs, the special appellants :—Bombay Act VI. of 1862 gave no power to the Tálukdár to put a stop to the service at pleasure and recover the land or levy assessment upon it. The Tálukdár himself could not do so. The land was not service land. It was granted for past service. There is no evidence that the grantee or those who came after him, including the plaintiffs who came in as purchasers, as we allege, or as mortgagees, as the Courts below hold it established, ever performed service. Their possession of the land is adverse, and extends over fifty years. The Tálukdár or the Talukdári Settlement Officer cannot stop service if it was performed at pleasure. The suit is, at all events, barred by lapse of more than twelve years from the death of Jiva, the cook to whom the land was granted, for the office of cook was not hereditary, nor is it proved that those who held the land after Jiva were his heirs.

Honourable Rao Sahib F. N. Mandlik, Acting Government Pleader, for the Tálukdári Settlement Officer :—The land is service land held rent-free. Mere lapse of time and non-performance of service do not bar a Tálukdár's right to demand service from the holder of service lands. The case might be different if the holder had, on demand, refused to render it. The mere fact that the Tálukdár did not require service cannot of itself bar his right. Section 3 of the Tálukdári Act authorizes the Settlement Officer to remove the holder from possession.

1877. "
 KEVAL
 KUBER
 " THE TÁLUK-
 DÁRI SETTLE-
 MENT
 OFFICER

587
 1-10-11
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1877. *Naginādas Tulsidās*, for the Tálukdār, adopted the argument of the Government Pleader.

KIVAL
KUBER
v
THE TÁLUK-
DÁRI SETTLE-
MENT
OFFICER.

MELVILL, J.:—The land in dispute has admittedly been rent-free for fifty years. This is sufficient to throw upon the person demanding rent the burden of proving that rent is due.

The case made by the defendant (the Tálukdári Settlement Officer) is that the land is service land, and that, as service is no longer required, rent must be paid. It appears to us that this is not a sufficient defence to the action.

In *Baboo Koolodeep Narain Singh v. Mahadeo Singh*⁽¹⁾ Peacock, C J., says:—"I must say that this is the first time I have ever heard such a contention as that a landlord can dispense with the services upon which lands are held whenever he pleases, and take back the estate. It is not because the services are released or dispensed with or become unnecessary that the estate can be resumed. If a grantor release the services, or a portion of the services, upon which lands are holden, the tenant may hold the land free of the services; but the landlord cannot put an end to the tenure and resume the land. Many services upon which very valuable estates are held are of little value now. The estates may be very valuable, and the services almost valueless. But some large landed proprietors would be somewhat astonished if they were told that the services have been dispensed with, and their estates are liable to be resumed. It might as well be contended that if lands are granted at a small quit-rent, the landlord might relinquish or dispense with the payment of the rent, and take back the lands. It is said in the plaintiff's written statement that the sanad was granted upon condition of rendering services. But even if it were so, the person to whom the condition is to be performed, cannot, by dispensing with the performance of the condition, put an end to the grant. If lands were granted upon condition of paying a certain rent, the grantor or his representatives would have no right to say, when the lands are very valuable, 'I will dispense with the performance of the condition, I will exempt you from the payment of the rent, and I will take back the estate.' If he could not do so in the case of rent, why should he be able to do so in the case of services?"

In *Forbes v. Meer Mahomed Tuquee* ⁽¹⁾ their Lordships of the Privy Council say that they cannot but express their concurrence in many of the general principles laid down by the Chief Justice in the above passage.

1877.

KEVAL
KUDERv.
THE TALUK-
DARI SETTLE-
MENT
OFFICER.

In the same case their Lordships adopt a distinction between the grant of an estate burdened with a certain service, and the grant of an office, the performance of whose duties is remunerated by the use of certain lands.

Of the former description of grant they say: "Their Lordships do not dispute that it might have been so expressed as to make the continued performance of the services a condition to the continuance of the tenure. But in such a case either the continued performance of the service would be the whole motive to, and consideration for, the grant, or the instrument would by express words declare that the service ceasing, the tenure should determine."

In the present case, if the grant was of the former description, there is no evidence whatever that it was of such a nature, or so expressed, as to make the continuance of the tenure dependent on the continuance of service. The grant may have been made as a reward for past as well as an inducement to future services. No *sanad* is forthcoming, so that of the terms of the grant we know nothing.

If the grant were of the other description (and looking to the nature of the service—that of cook to the Durbar—it probably was so), the use of the land was merely a remuneration of the service, and *prima facie* the grantor would be entitled to resume the land if the service ceased. But it appears to us that the right to do so has become barred by lapse of time. The original grantee, according to defendant's statement, was Jiva Keshav. Jiva seems to have had nothing to do with the land after 1834, and it was dealt with as their own by the persons through whom the plaintiffs claim. Still it may be admitted that, as the District Judge says, the Talukdar had no occasion, so long as Jiva lived and the service was performed, to trouble himself as to the manner in which the land was dealt with. But Jiva died in 1853, and then,

(1) 13 Moore Ind. Ap. 438, see p. 463.

1877. at all events, if not before, the right of resumption accrued. Even in this country the office of cook can hardly be considered hereditary. Jiva's successor in the office, Morar Ganesh, is not shown to have been his heir. There must have been a fresh appointment; and if the use of the land were intended to be the remuneration of the new cook, a resumption and re-grant were necessary. Nothing of the kind is shown to have been done. It is true that ten years after Jiva's death the land was entered in the name of Morar Ganesh. But Morar Ganesh never had possession of the land. The plaintiffs and those through whom they claim (or their mortgagees) have had undisturbed possession for some forty years; and, at all events since Jiva's death, that possession must be regarded as adverse to the Tálukdar. His right to resume or to assess the land is, consequently, barred by Act IX. of 1871, Section 29, and Article 130, Schedule II.

For these reasons we reverse the decree of the Courts below, and allow the claim with costs on defendants throughout.

Decree reversed.

[APPELLATE CIVIL JURISDICTION.]

Before Mr. Justice Melhull and Mr. Justice Kemball

RAGHOJI BHIKAJI AND OTHERS (DEFENDANTS, APPELLANTS) *v.*

ABDUL KARIM (PLAINTIFF, RESPONDENT).^a

Limitation—Promise—Acknowledgment—Recovery of barred debt—Act XIV. of 1859, Section 4—Act IX. of 1871, Section 20—Act IX. of 1872, Section 25, Clause 3.

The "promise" referred to in Section 20 of Act IX. of 1871 is a promise introduced, by way of exception, in a suit founded on the original cause of action, and not a promise constituting a new contract, and extinguishing the original cause of action. Accordingly a suit is not barred which is brought on a bond executed, in consideration of a barred debt, after the expiration of the period prescribed for its recovery.

THIS was a special appeal from the decision of W. Wedderburn, Judge of the District of Ratnágiri, amending the decree of the 1st Class Subordinate Judge of Ratnágiri.

The plaintiff, on the 18th of August 1875, sued the defendants to recover from them two instalments on a bond for Rs. 1,400,

^a Special Appeal No. 393 of 1876.

with interest at 12 per cent. per annum, dated the 7th of August 1873. He claimed Rs. 200, payable on the 1st of November 1873, and Rs. 300, payable on the 1st of November 1874, with interest Rs. 118, but allowing a set-off of Rs. 50 already received, in all Rs. 568.

1877.

RAGHOJI
BHIKAJI
v
ABDUL
KARIM.

The defendants denied the execution of this bond, and stated that they owed nothing.

The bond purported to have been executed for a balance due on a previous instalment bond, in regard to which default had been made in payment of the first instalment as far back as September 1864, although payments had been received by the creditor up to 1873. The Subordinate and the District Judge in appeal found the bond proved; the former declared that only Rs. 98 remained due to the plaintiff, the latter awarded Rs. 568.

Shántarān Nārāyan, with him *G. N. Nadkarni*, for the special appellants:—The bond now sued on is merely an acknowledgment or promise to pay the debt which had accrued on the old bond No. 34. This debt had already become barred, since the period of limitation in regard to it dated under the old law from the first default, and the change made by the new law did not revive a time-barred debt. Such a promise was not by the new law of limitation, Section 20 of Act IX. of 1871, sufficient to sustain the suit. In this enactment the Legislature has made two important additions to the old law on the subject contained in Section 4 of Act XIV. of 1859, which revived a barred debt by an “acknowledgment” in writing, signed by the party to be charged therewith. The Legislature has coupled the word “promise” with acknowledgment, and placed a limitation to the revival of the debt, by enacting that the promise or acknowledgment must be signed “before the expiration of the prescribed period.” They cited the cases mentioned in the judgment below.

[MELVILL, J.:—In Section 25, Clause 3 of the Contract Act, the Legislature has preserved the well-known rule of law that a time-barred debt is sufficient consideration to support a contract.] The two provisions should be so read as to form but only one rule embodying this limitation.

Honourable V. N. Mandlik, Acting Government Pleader, for the respondent, was not called upon.

1877 The judgment of the Court was delivered by

RAGHJI
BHAKAJI
v
ABDUL
BARIM.

MELVILLE, J.—The alteration in the former law (Section 4 of Act XIV. of 1859) made by the introduction, into Section 20 of Act IX. of 1871, of the words “promise” and “before the expiration of the prescribed period,” gives some colour to the argument that it was the intention of the Legislature that a debt once barred by lapse of time should not, under any circumstances, be recovered. But the supposition of any such intention is contradicted by Section 25, Clause 3, of the Indian Contract Act, from which it is clear that the “promise” referred to in Section 20 of Act IX. of 1871 is a promise introduced, by way of exception, in a suit founded on the original cause of action, and not a promise constituting a new contract and extinguishing the original cause of action. The distinction is pointed out in the cases cited at the bar. *Mukhand v. Gudhar*, ⁽¹⁾ *Harigopal Premnathdas v. Abdul Khan Haji Muhammad*, ⁽²⁾ and also in *Gopce Kishen Goshanace v. Brindabanchundkar Sircar*. ⁽³⁾

The decree of the Court below must be affirmed with costs.

Decree affirmed.

[APPELLATE CIVIL JURISDICTION.]

Before Mr. Justice Kemball and Mr. Justice Nánabhái Davidas.

1876
March 8

KAMBIAT AGNIHOTRI (PLAINTIFF, APPELLANT) v. THE COLLECTOR OF PUNA (DEFENDANT, RESPONDENT) *

Prescription—Possession—Adverse possession—Limitation—Regulation V. of 1827—Act XIV. of 1859—Act IX. of 1871.

Some lands in the village of Shiragám in the Puna Collectorate, commonly called “Kolhátí Báwá’s Inám,” originally belonged to His Highness Scindia. Plaintiff’s family were proved to have been in actual possession of them from 1841 to 1854, and in constructive possession during their attachment by the Inám Commission from 1854 to 1863, when, by a mistake in carrying out the orders of the British Government, the lands passed into the possession of Scindia, and remained with His Highness till 1872, in which year the British Government, by exchange of lands, came into possession. In a suit brought on 29th July 1872.

Held that the plaintiff's possession, not extending over 30 years, gave him no proprietary title under Section 1 of Regulation V of 1827, which, as a law of positive prescription, is not repealed by Act XIV. of 1859. Under the former Limitation Act, 12 years' adverse possession barred the suit without extinguishing the title so that if a proprietor who had been out of possession for more than 12 years happened to regain it, the person who had been in adverse possession must fail in any suit to eject the proprietor, unless he sued within six months under Section 15 of the Act. The effect of Act IX. of 1872, Section 29, however, is not merely to bar the remedy, but to extinguish the title of the original proprietor after 12 years of a possession adverse to him.

THIS was an appeal from the decree of Baron De Larpent, Judge of the district of Puna.

Shántáran Nárayan for the appellant.

Honourable V. N. Mandlik, Acting Government Pleader, for the defendant.

The facts and arguments, in so far as they are material for the purposes of this report, fully appear from the judgment of the Court, which was delivered by

KEMBALL, J.:—The plaintiff brought this suit to recover possession of 4,800 *bighas* of land, forming the Kolhāti Bāwā's Inām in the village of Shinasgām, together with mesne profits including certain *hals* acquired from the Pant Sachiv. It appears from the Judge's judgment that at one time the Peishwa Scindia and Pant Sachiv all possessed certain rights in this land, as also, presumably, in all the land of the village. The Peishwa's rights came to the British Government after the conquest of the Deccan, while those of the Pant Sachiv were made over to the plaintiff's family. With regard, however, to Scindia's rights, it appears that in 1852-53 a dispute arose between Scindia's Government and the plaintiff's family. The agent for His Highness Scindia applied to the Collector of the district for assistance to levy the full assessment on the land, contending that the case set up, that Scindia's rights had been made over to plaintiff's family, was false; but as the assessment had already been taken for that year, Scindia's agent was told to apply in good time in respect of the following year's assessment; he did so, and the required assistance was given. The plaintiff's family thereupon appealed to the Revenue Commissioner, who reversed the Collector's proceedings, and ordered that the assessment levied with the Collec-

1877.

RÁMBHAT
AGNIHOTRIv
THE COLLECTOR
OF PUNA.

1877.
 AGNIHOTRI
 v.
 THE COLLECTOR
 OF PUNA.

tor's assistance should be refunded, but at the same time he directed that the Inám Commission should inquire into the title to the land. Consequent upon this order the land was attached by the Inám Commission and placed under the management of the District Revenue Officers, and, subsequently, the Inám Committee found that neither Scindia nor the plaintiff's family had any right to the land, which they decreed belonged to the British Government. The Government, however, refused to confirm this order, and in 1863 the Revenue Commissioner, acting under the orders of Government, directed that the land should be restored to the possession of the person or persons from whom it had been taken. Thereupon the Collector directed that possession should be given to the plaintiff, but, for some reason unexplained, it was given to Scindia. So matters remained till the year 1872, when His Highness Scindia exchanged this disputed land together with the rest of the village with Government for other lands, and, in the year following, plaintiff brought the present suit for the purposes above stated. The Government in their reply contended that the Kolhāti Bāwā's Inám land contained only 2,663, *bighás*, and not 4,800 as alleged, to no portion of which had plaintiff any title, that the land was given in exchange by Scindia, for whose acts they were in no way responsible, and that plaintiff's family had not been in uninterrupted enjoyment as alleged till they were dispossessed. At the trial the Judge found, upon issues framed by him, that plaintiff was in actual possession at the time of the attachment, and, therefore, in constructive possession when the land was released from attachment, and that the amount of land, of which plaintiff had possession, was 4,800 *bighás*; but he held that the fact that plaintiff's family had had possession from 1841 to 1852, which he considered proved, did not establish plaintiff's title as proprietor, and that, therefore, Government gave possession to the party entitled thereto.

The Government abandoned at an early stage its defence as regards the Pant Sachiv's rights, so that that question is not now before us, except as to the amount, and also in so far as it affects the matter of costs; the Government having been ordered to bear its own costs in the suit on the ground that the defence raised in respect of the said rights had, in the opinion of the Judge, tenped

most unnecessarily to increase the costs of the suit. Both parties are dissatisfied with the decree of the Court below, the plaintiff contending, among other points, that the District Judge was wrong in holding that his proprietorship was not established, and that long possession for a period of 80 years, continuing down to the time he was dispossessed by the Inam Commission, entitled him to restoration of possession: and the defendant objecting to the Judge's finding as to the extent of land in issue, and his order as to costs. It has been seen that, although the Judge found that the plaintiff's family had been in possession of the whole of the land in dispute from 1841 to 1854, he decreed against the plaintiff on the ground that plaintiff had failed to prove his proprietorship. The Judge based his decision on the grounds that there was no *sanad* in the case; that the village in which the land was situated was, before the exchange with the Government, undoubtedly Scindia's; that Scindia, before the exchange, had refused to acknowledge plaintiff's title; and that the oral evidence of occupation, either before or after 1841, afforded no proof of plaintiff's title.

In explanation of the name which the land in dispute bears, the Judge speaks of a tradition in the village, that some 400 years ago one Yeshvantaiv Kolhati (Kolhati meaning a tumbler or rope-dancer) was allowed to appropriate to himself as much land as he would jump over, and that he jumped with such success that the villagers found it necessary to shoot him while up in the air in order to prevent the whole of the land of their village being included within his jump. The land covered by the jump continued waste for a great many years, and in A. D. 1789 an ancestor of the plaintiff made a proposal to Scindia to build a temple on the banks of the Goor, and prayed that it might be endowed with this land.

The plaintiff's case is that the grant was made, and that thereupon his ancestor entered into possession, continuing there till 1854.

With regard to the grant, it is admitted that no *sanad* is forthcoming, and it is not alleged that a *sanad* ever existed. And it is clear from evidence in the case that Scindia, as the occasion

1877
RÁMBHAT
AGNIHOTRI
v.
THE COLLEC-
TOR OF PCNA.

1877. arose, uniformly and repeatedly denied the grant set up, and retained absolute possession from 1862 down to 1872, when the exchange was effected with the Government.

RÁMBHAT
AGNIHOTRI
v
THE COLLECTOR OF PUNA. As to the long possession as proprietor, it is admitted that there is nothing to show when possession was first obtained by any of plaintiff's ancestors. We have examined all the evidence, which was carefully and ably placed before us by the pleaders on both sides, and we find it is not proved that Keshavbhat, the alleged original grantee, who died in 1830, was ever in possession. Furthermore it is clear from documentary evidence recorded in the case, notably Exhibit 339, a petition of Keshavbhat's son, Yedneshvarbhat, of the 29th March 1841, and Exhibits 43, 39, and 338, that the temple, for the endowment of which the grant was sought, was not built at so comparatively recent a period as 1843. Three witnesses, Nos 274, 285 and 290, were produced on behalf of the plaintiff for the purpose of establishing possession from a remote period, but they are all illiterate men, and their statements are of so vague and general a character, being on some points also contradictory, that we concur with the Judge in thinking that no conclusion favourable to plaintiff's title as proprietor can be drawn from them.

Much stress has been laid upon what took place between the plaintiff's ancestor and the British Government subsequent to 1841 ; but it is clear that this would have no material bearing on the point in dispute. The village belonged, prior to the exchange, to His Highness Scindia, and the only interest the Government had was in the recovery of its Mokassa dues. In fact, express reference was made to the benefit which would accrue to Government by the receipt of fees when the application (Exhibit 42) of the 24th September 1843 was made by a member of plaintiff's family for permission to bring a portion of the land under cultivation. When the land was first brought under cultivation is not very clear, but it is beyond dispute that it had been previously to 1843 lying waste for a great many years—the application to the Collector just referred to says 500 or 600 years ; and it is clear that in 1853 His Highness Scindia expressly denied the plaintiff's proprietary right in the land. After the land was restored to His Highness Scindia, plaintiff applied, but without

success, to have his right acknowledged and to get possession, and now that the land has formally passed to the British Government, he seeks redress through its Courts.

1877. *

RÁMBHAT
AGNIHOTRY
v.

THE COLLECTOR
OF PUNA

It now remains to consider the last, though by no means least important, part of the plaintiff's argument, that the finding of the Judge as to his long possession, independently of other considerations, entitles him to restoration of possession.

The District Judge certainly finds that the plaintiff was in possession of the lands in dispute from 1841 to 1854, when they were attached by the Inám Commission. This is a finding which is based upon a large body of oral as well as documentary evidence referred to in his judgment, and it has not been shown to us that he has in any way misappreciated that evidence.

The evidence as to the plaintiff's possession prior to 1841 is, as we have already observed, exceedingly unsatisfactory, and we are of opinion that he has failed in proving it.

We must then take it as established that the plaintiff was deprived of what he had been in continuous possession of from 1841 to 1854. That the lands in dispute belonged originally to His Highness Scindia must be regarded as undisputed, since the plaintiff's own case is that they were granted by him to one of his ancestors,—a case which he has failed to prove. His possession of those lands, therefore, was without any title; and the question is whether he is entitled, upon the bare fact of such possession, to recover in this suit.

It is contended for him that he is, and in support of such contention we are referred to several authorities, of which the most important are *Raja Baradakant Roy v. Prankrishna Paroi*,⁽¹⁾ *Amirauinisa Begum v. Umar Khan*,⁽²⁾ *Gunga Govind v. Collector of 24-Pergunnahs*,⁽³⁾ and *Brassington v. Llewellyn*.⁽⁴⁾

It is necessary to observe here that this suit was commenced on the 29th July 1872, before "The Indian Limitation Act, 1871," came into operation, and while Regulation V. of 1827 and Act XIV. of 1859 were in full force.

(1) 3 Beng. L. R., A. C. J. 343.

(2) 8 Beng. L. R. 504; S. C., 17 Calc. W. R. 119., A. C. J.

(3) 11 Moore I. A. 345; S. C. 7 Calc. W. R. 21, P. C.

(4) 27 L. J. Exch., 297.

1877
LAMPHAR
AGNIHOTRI
v
THE COLLEC-
TOR OF PUNA

Regulation V. of 1827, Section 1, was our law both of limitation and prescription. It laid down 30 years as the period within which a suit for immoveable property might be brought. It also laid down that 30 years' adverse possession of such property was to be regarded as conclusive proof of proprietary right in the possessor, except in case of fraud.

This continued to be the state of the law in the Bombay Presidency until Act XIV. of 1859, which received the assent of the Governor General on the 4th May 1859, and came into force on the 4th May 1861. That Act provides a shorter period of limitation, namely, 12 years, for suits relating to immoveable property. It, therefore, by implication, repeals Regulation V. of 1827, Section 1, so far as it is a law of limitation. But so far as it is a law of positive prescription, it is left untouched by that Act. Their Lordships of Her Majesty's Privy Council, in their judgment in *Maharana Fattchangan v. Desai Kallhamaji*,⁽¹⁾ observe with regard to it that it is "an enactment which inasmuch as it relates only to the acquisition of a title by positive prescription, seems to be unaffected by Act XIV. of 1859, and to stand unrepealed in the Presidency of Bombay."

Such being the case, until Regulation V. of 1827, Section 1, was expressly repealed by Section 2, Act IX. of 1871, on 1st April 1873, the state of the law in the Bombay Presidency was this:—A person who, without title, had been in adverse possession of any immoveable property for 12 years could, under Clause 12, Section 1 of Act XIV. of 1859, resist any suit brought to recover it from him; but no such possession short of 30 years could create a title in his favour under Regulation V. of 1827, Section 1. The proprietor's title, therefore, did not become extinguished by 12 years' adverse possession of another, though his right of suit against that other became barred by Act XIV. of 1859. That Act in terms only bars the remedy, but does not extinguish the right,⁽²⁾ as does Act IX. of 1871, Section 29. Accordingly, if such person happened to lose his possession, and the proprietor to regain

(1) L. R. 1 Ind. App. 34, 51; S. C. 10 Bom. H. C. Rep. 281, 288.

(2) I. Mad. H. C. Rep. 85, 89.

Note.—In England, before the passing of 3 and 4 Will. IV., c. 27, the state of the law was the same. It barred the remedy but did not extinguish the right; see 9 L. J. K. B. 262; 16 L. J. Q. B. 355; 19 L. J. Exch. 177;

it, the former, unless he sued within 6 months under Section 15 of that Act, must fail in any suit to eject the latter, having no title to stand upon. [See *Savulgiapa v Basvanapa*.⁽¹⁾]

1877
RÁMBHAT
AGNIHOTRI

Of the four cases cited by Mr. Shántarám for the appellant, the first three are Bengal cases; still if it appeared to us that the learned Judges who decided them had considered the effect of such a separate law of prescription as the Bom Reg. V. of 1827, Sec 1, we should probably feel ourselves bound to follow them, and hold that 12 years' adverse possession by the plaintiff extinguished the proprietor's title and transferred it to him, especially as one of them is a case decided by Her Majesty's Privy Council on appeal from Bengal. But it does not appear from those cases that they had any such law to consider in any of them. No doubt, as their Lordships of the Privy Council observe, "as between private owners contesting *inter se* the title to lands, the law has established a limitation of twelve years." But to hold here, as they have done in the Bngal case, that "after that time it declares not simply that the remedy is barred, but that the title is extinct in favour of the possessor," would, in our opinion, be to entirely ignore Regulation V. of 1827, Section 1, which, in their Lordships' own words, in a later case, "seems to be unaffected by Act XIV. of 1859, and to stand unrepealed in the Presidency of Bombay." ⁽²⁾

The remaining case of *Brassington v. Llewellyn* ⁽³⁾ turned upon the English Statute of Limitations 3 and 4 Will. IV., c. 27, ss. 2 and 31, the effect of which, as laid down in it, is that "after twenty years' possession adverse to a title, it is extinguished, so that it cannot be revived or re-vested by a re-entry after that period, upon the doctrine of remitter; because such an application of the doctrine requires that the former title should be in existence at the time of the re-entry." But Section 34 of that statute is in effect the same as Section 29 of Act IX. of 1871, the like of which is not to be found in Act XIV. of 1859. The absence of a similar provision in that Act and the express provision in Regulation V. of 1827, Section 1, had, in our opinion, the effect of preventing adverse possession for less than 20 years from working an extinguishment of title.

(1) 10 Bom. H. C. Rep. 399.

(2) L. R. 1 Ind. App. 34, 51.

(3) 27 L. J. Exch. 297.

^v
THE COLLEC-
TOR OF PUNA.

*1877 The plaintiff's possession, actual from 1841 to 1854, and constructive during the attachment, namely, from 1854 to 1863, had not extended over 30 years, when the lands in dispute, instead of being returned to him as originally intended, were made over to His Highness Scindia. He had not, therefore, acquired any prescriptive title to them under Regulation V. of 1827, Section 1; and since the title was still in His Highness Scindia, as soon as they were made over to him, he had both his unextinguished title and his possession to oppose to any claim that might be made against him. The plaintiff, having delayed bringing his suit for more than 6 months, has lost such benefit of his previous possession as he might have had under Section 15 of Act XIV. of 1859; and Government represented by the defendant, having taken an assignment of His Highness Scindia's right, title, and interest in those lands, are now entitled to resist this suit upon whatever grounds their assignor would have been entitled to do so.

RAMBHAT
AGNIHOTRI
v
THE COLLEC-
TOR OF PUNA.

The result is that we concur with the Judge in thinking that the plaintiff has failed to establish his title to recover possession, and must, therefore, uphold that portion of his decree which throws out the claim to possession of the land with mesne profits.

With regard to the Pant Sachiv's rights, we hold that the plaintiff is entitled to the profits for 6 years at the rate of Rs. 55-1-10 per annum, and to that extent we amend the District Judge's decree.

We confirm the order as to costs, and direct that the costs of this appeal be borne by the appellant.

Decree amended.

[APPELLATE CIVIL JURISDICTION.]

Before Mr. Justice Melvill and Mr. Justice Kemball.

ARDESIR NASARVANJI (PLAINTIFF, APPELLANT) *v.* MUSÉ NATHA AMIJI (DEFENDANT, RESPONDENT). 1877
March 13.

ARDESIR NASARVANJI (DEFENDANT, APPELLANT) *v.* MUSÉ NATHA AMIJI (PLAINTIFF, RESPONDENT).*

Bhágdári and Narvádári Tenure—Bombay Act V. of 1862—Sale of unrecognized portion.

The sale of a portion of a *bhág* or share in a *Bhágdári* or *Narvádári* village other than a recognized subdivision of such *bhág* or share, or of a building site appurtenant to it, is illegal under Section 3 of Bombay Act V of 1862 and a judgment-creditor cannot, in execution of his decree, evade the law by describing his debtor's separate portion in a *bhág* as his "right, title, and interest in the whole *bhág*," for, under Section 213 of the Code of Civil Procedure, the creditor is bound to specify the debtor's share or interest to the best of his belief, or so far as he has been able to ascertain the same.

Quære, if the sale of an undivided share in a *bhág* be lawful, but even if it be, the purchaser cannot insist upon the possession of any particular portion of the *bhág* as representing the share of his debtor. All he can do is to sue for partition.

But *Quære* if such partition could be made.

THESE were special appeals from the decisions of H. F. Aston, Assistant Judge of Surat, amending the decrees of the 2nd Class Subordinate Judge of Broach

In one suit Musé sought to recover from Ardesir possession of fields Nos. 190, 466 and 472 in the *Bhágdári* village of Sitpan of the Broach Collectorate. He alleged that he had bought No. 190 from his brother Mahamed, and that he was the proprietor of the other fields in his own right; and that the Civil Court, in contravention of the provisions of Bombay Act V. of 1862, sold the fields to Ardesir, and put him in possession in execution of a decree obtained against the said Mahamed by one Vijbhukan.

Ardesir contended that the alleged sale to the plaintiff by his brother was collusive, and that the other fields—supposing them to belong to the *bhág*—had not been separated and recognized by the Collector, and the suit not being for such separation, could not lie.

* Special Appeals No. 3 and No. 5 of 1877.

1877
 ARDESIR
 NASARVANJI
 v
 MUSÉ
 NATHA
 AMIJI.

The Subordinate Judge made a decree in favour of the plaintiff for Nos. 466 and 472, dismissing the claim for No. 190.

In the second suit Ardesir sued Musé for possession of a house and building-site. At the sale by Vijbhukan, through the Court, Ardesir became the purchaser of these as well as of the land which Musé sought to recover from him in the suit above described, and which had already passed into Ardesir's possession. In his plaint Ardesir alleged—as he did in his defence to Musé's suit—that the transaction between the brothers was collusive.

Musé based his defence upon his right as a Bhāgdār under the Bombay Act V. of 1862.

The Subordinate Judge awarded half of the house and the whole of the building-site.

Appeals were brought against both the decrees of the Subordinate Judge. In disposing of them the Assistant Judge, Mr. Aston, said—

“ It is admitted by the vakils of both parties that the judicial sale referred to in the plaint [of Musé] was a sale nominally of a whole *bhāg*, of which Nos. 190, 466, and 472 were portions, but not recognized subdivisions. That the sale was also of the houses and building-site appertaining, also that the whole *bhāg* or share previously belonged to Nathá Amiji, the father of Musé and Mahamed, and afterwards to the above two brothers, Musé and Mahamed; also that the decree under which the above judicial sale was held was against one brother only, viz, Mahamed, and that the right, title, and interest of the said Mahamed thus brought to sale only amounted to a right to share in the *bhāg* and not to a right to a *recognized* subdivision of the *bhāg* * * *

* * * * *

The vakil for the defendant Ardesir admits that the *bhāg* has been dismembered, and there has also been a severance of the building-site and house from the part of the *bhāg* remaining with the brother Musé. The vakils for both say that it is widely customary in the Broach district for judgment-creditors to bring to sale a whole *bhāg* as the property of a judgment-debtor, when the judgment-debtor is not the sole proprietor of the *bhāg*; that the Courts below allow such *bhāg* to be described as the property

of the judgment-debtor, because, unless the whole *bhág* is shown as the property of the judgment-debtor, the sale would be invalid; and they believe that such nominal sales of the *bhags* are permitted by the Courts, knowingly, to enable the decrees to be satisfied, and to prevent the Collector's intervening * * *

Both vakils further state that it is customary in the Broach district for a co-sharer to sell or mortgage nominally a whole *bhág*, and then to give possession of only that part of which he has separate possession. They are not aware of any instance in which, after decree against a co-sharer in a *bhág*, and judicial sale of the right, title, and interest of that co-sharer, any suit to separate that share by partition has been brought in the Broach district."

Mr. Aston then proceeded to find, from the admissions of the parties as well as from the evidence recorded in the case, that the defendant Ardesir purchased only the right, title, and interest of one of two co-sharers in the *bhág*, and held that the effect of Sections 1, 4, and 5 of Bombay Act V. of 1862 was to render the transaction invalid, giving no right whatever to the defendant. He, therefore, amended the decree of the 2nd Class Subordinate Judge, and awarded the entire claim.

Shantaiám Nai áyan for the defendant, the special appellant:—The plaintiff Musé is in separate possession of the field No 190 under the sale from his brother Mahamed. The *bona fides* of the sale was disputed; but the Assistant Judge does not go into the question, but contents himself with holding that the sale by the Civil Court of Mahamed's right, title, and interest in the *bhág*, ostensibly put up for sale, was invalid under the Bhágdári Act. What actually was put up was the recognized subdivision belonging to the brothers Musé and Mahamed; the Collector did not object, and he could not do so of his own accord, as held in *Ráji v. Purshotam*.⁽¹⁾

[KEMBALL, J.:—The entire *bhág* having been ostensibly put up for sale, the Collector had no opportunity of objecting.]

The law does not prohibit the sale of the whole *bhág*, the object of which was not to dismember the *bhág*. The Legislature could not have intended to place Bhágdárs at a greater disadvantage than ordinary borrowers. The Act is intended to benefit them, and

(1) 2 Bom. H. C. Rep. 231.

1877. •
ARDESIR
NARSAYANJI
MUSÉ
NÁTHA
AMJI.

1877 the effect of the interpretation placed by the Assistant Judge would be to hamper them in their money dealings.

ARDESIR
NASARVANJI
v
MUSÉ
NÁTHÁ
AMÍJI.

Gohuldas Kahandas Parekh for the respondent:—The object of the Legislature in passing Bombay Act V. of 1862 was to prevent alienations of unrecognized *bhags*, and to prevent civil process from affecting them. This object would be defeated by the interpretation sought to be placed by the other side.

The following judgment of the Court was delivered by

MELVILL, J.:—The only objection taken in special appeal to the decision of the Assistant Judge is that he was in error in holding that the sale of the right, title, and interest of the judgment-debtor Mahamed Nátha to Ardesir Nasarvanji was null and void, as being contrary to Bombay Act V. of 1862.

It appears that, on the application of the decree-holder, the whole of a *bhág* or share in a *bhágdar* village, together with a house and *gubhan*, standing in the name of Natha Amiji, was attached in execution of a decree against Mahamed Nátha, one of the sons Nátha Amiji. The proclamation and certificate of sale were made in the usual terms, and Ardesir became the purchaser of the right, title, and interest of Mahamed Nátha in the attached property. In attempting to take possession he was opposed by Musé Nátha the brother of Mahamed Nátha, but with the assistance of the Court he succeeded in obtaining possession of three survey number fields, forming a portion of the *bhág* but was refused possession of the house and *gubhan*. In consequence a suit was brought by Ardesir to recover the house and *gubhan* from Musé Nátha, who, in his turn, sued Ardesir for possession of the fields. The Assistant Judge in appeal held that the sale to Ardesir, being a sale of a portion of a *bhág* other than a recognized subdivision, was contrary to the provisions of Bombay Act V. of 1862, and on this ground he decided both suits in favour of Musé Nátha.

In support of the special appeals it has been contended that Section 1 of Act V. of 1862 only prohibits the attachment and sale of a portion of a *bhág*, and that in the present case it was not a portion of a *bhág* which was sold, but the undivided share

This contention is, perhaps, in accordance with certain admissions said by the Assistant Judge to have been made by the pleaders of the parties in his Court; but it is certainly not in harmony with the pleadings in the case, nor, apparently, with the circumstances out of which the suits arose. Those pleadings and those circumstances negative the supposition that the two brothers, Mahamed Náthā and Musé Nátha, were undivided co-sharers. Musé claims the whole of the property in dispute, partly as being his own original and distinct share in the *bhāg*, and partly as having been purchased by him from his brother Mahamed. On the other hand, Ardesir has been placed in possession of three fields, as if the same had been the separate share of Mahamed, and he is suing for the house and *gubhan* on the same hypothesis. It seems scarcely open to doubt that, at the time of the attachment and sale, Mahamed and Musé were not undivided co-parceners, but were in possession of the separate shares, to which they were entitled under Muhammadan law.

If this were the case, the attempt to render Mahamed's property available to his creditors by selling, not his separate portion of the *bhāg*, but his right, title, and interest in the whole *bhāg*, was merely an attempt to evade the provisions of Act V. of 1862: and, if the statements of the pleaders in the Court below be correct, the Act is in this manner systematically evaded with the connivance of the Subordinate Courts. This Court is certainly not disposed to give a sanction to any such proceedings. A creditor who applies for an attachment of his judgment-debtor's property is bound to specify the debtor's share or interest therein, to the best of the applicant's belief, and so far as he has been able to ascertain the same (Act VIII. of 1859, Section 213). If the defendant has only a share in the property, the applicant ought to state whether such share is undivided or separate. When the share is stated to be undivided, then only ought the defendant's right, title, and interest in the whole property to be sold. When the share is stated to be separate, then the sale ought to extend only to the defendant's right, title, and interest in such separate portion. If the defendant has a separate portion, and the law forbids the sale of such separate portion, but allows the sale of the whole property, the law is not to be evaded by describing the

1877 .
ARDESIR
NASARVANJI
v.
MUSÉ
NATHA
AMJI.

1877. defendant's portion as the defendant's right, title, and interest in the whole estate. What is sold under such description is the separate portion and nothing more. In the present case it seems clear, from the pleadings and the facts, that Mahamed Nátha had a separate portion of the *bhág*, and the sale of such separate portion was directly opposed to the provisions of Act V of 1862.

ARDESIR
NARSARVANJI
v
MUSÉ
NÁTHA
AMJI.

It is difficult to understand how the pleaders in the Court below could have stated that Mahamed and Musé were undivided co-parceners. We cannot help thinking that the Assistant Judge must have misunderstood their statements upon this point, such statements being, as we have said, inconsistent with the pleadings and with the conduct of the parties. We do not feel bound to decide this case as if those doubtful statements were correct, nor to determine the question whether the attachment and sale of an undivided share in a *bhág* would be contrary to the letter or spirit of Act V. of 1862. It is sufficient to say that, even if such a sale were lawful, and even if Ardesir were the purchaser of an undivided share, he would not be entitled to insist, as he is now doing, upon the possession of any particular portion of the *bhág*, house, or *gubhan*, as representing the share of Mahamed Nátha. *Appovier v. Ramasubha Aryan*,⁽¹⁾ *Udarám Sutarám v. Ránu Pandur*.⁽²⁾ All that he could do would be to sue for a partition, which admittedly he has never done, and which he is not now doing: and the question would then arise whether, consistently with the provisions of Act V. of 1862, such a partition could be made.

1877. formal adoption is not invalid because it has not received the sanction of the ruling power,—*Ramchandra Vassudev v. Nanaji Timaji*,⁽¹⁾ which case is exactly on all fours with the present. The Hindu Law does not require the sanction of the ruling power for adoption. The adopter has only to announce his intention to the Raja or King, 'restricted, according to the remark of Nanda Pandit, to the Chief of the town or village.' Mitakshara, Chap. I., Sec. XI., Pl. 13, and annotations thereto; Stokes' H. L. Books, p. 417. The announcement is only to be made for the sake of publicity, and with a view to avoid future disputes and litigation, and may be dispensed with: 1 Str., H. L., p. 94. There is no law, or custom having the force of law, that has superseded the Hindu Law on this point. The Bombay High Court, on the contrary, have upheld the Hindu Law in the decision quoted above with regard to this question."

NARHAR
GOVIND
KULKARNI
v.
NARÁYAN
VITHAL.

In appeal only the question of the invalidity of the plaintiff's adoption was raised and argued. The Assistant Judge confirmed the decree of the Lower Court with the following remarks on the question of adoption:—

"The ruling of the Bombay High Court in *Ramchandra Vassudev v. Nanaji Timaji*⁽²⁾ is to the effect that 'a formal adoption is not invalid, because it has not received the sanction of the ruling power, and (where the ruling power does not interfere) an adoption without such sanction entitles the adopted son to succeed to property of the nature of a service *vatan*.' The question now is whether the ruling power having interfered and repeatedly prohibited the adoption, the adoption is invalid.

"After considering this point I have come to the conclusion that the view of the law taken by the Subordinate Judge is correct, viz., that the adopter has only to make an announcement of the fact of the adoption to the ruling power, for the sake of publicity, and with a view to avoid future disputes and litigation, and which may be dispensed with. The rights of Government, with regard to service *vatans*, are totally distinct from the rights of individual *vatanidars* to adopt according to their law and their religion. Bombay Act III. of 1874 has come into force since this case arose, and it is quite clear from the provisions of that Act, that Govern-

(1) 7 Bom. H. C. Rep. 26. A. C. J. (2) 7 Bom. H. C. Rep. 28. A. C. J.

ment do not claim any power whatever to prohibit an adoption made by any representative *vatandar* or his widow.

"I may observe that the words in brackets, 'where the ruling power does not interfere,' which I have quoted above, do not appear in the High Court's decision, nor can they be gathered from that decision. They seem to have been introduced by the Reporters."

1877.
NARHAR
GOVIND
KULKARNI
v.
NARAYAN
VITHAL.

Minekshah Jehangirshah for the special appellant:—The property in dispute is a *Kulkarni vatan* for which service is rendered to Government. The Government, therefore, ought to have the right to say from whom they will take the service. Government expressly prohibited Ambábái from adopting a son, and she had no right to force upon the State a servant whom it did not want. The appellant is the *vatandar* selected by the State.

The Honourable Rao Sahab V. N. Mandlik for the respondent:—Government has no right to prohibit an adoption by a *vatandar*. Sections 34 and 35 of Bombay Act III. of 1874 allow freedom of adoption. The learned pleader also referred to Steele's Hindu Law, page 51, para. XL., 1st edition; page 45, para. XL., 2nd edition.

WESTROPP, C.J.:—It is unnecessary to resort to the doctrine of *factum valet* (if it be at all admissible in such a case) to uphold the adoption made by Ambábái, the adoptive mother of the plaintiff (respondent).

What may be or have been the right of Government to regulate adoption by the owners of principalities is a point which it is unnecessary for us to consider. We have here simply to deal with the office of a *Kulkarni* and its appendant rights or *vatan*. No authority either in a text book of Hindu Law nor in the reports has been cited to show that the sanction of Government to an adoption by a *Kulkarni*, or his widow, or by a co-parcener in a *Kulkarniship*, or his widow, is necessary to give it validity, or that Government has any right to prohibit or otherwise intervene in such an adoption. It has been argued for the appellant (the defendant) that Government ought to have a voice in such a matter in order to insure to itself a succession of suitable hereditary officers. No such right of intervention in adoption was

1877.
 NARHAR
 GOVIND
 KULKARNI
 v.
 NARAYAN
 VITHAL.

claimed for Government by Act XI. of 1843, when, if such a right existed, we might fairly expect to find that it would have been recognized; and Sections 33 and 34 of Bombay Act III. of 1874 are inconsistent with the existence of any such right. The provisions of these sections seem to be in accord with the passage in Steele's Hindu Law, page 51, para. XL, 1st edition; page 45, para XL, 2nd edition, where it is said: "It is enjoined that notice of an adoption should be given to the relations within the Satriya Sapindas, and to the Raja, though no provision appears in case of their disapprobation, even in adoption by widows." Those Acts made sufficient provision for securing to Government the services of competent officers: so that no such objection, in that respect, as suggested by the appellant's pleader, can arise. In the case of *Ramchandra v. Nanaji*⁽¹⁾ the defence was that the adoption had been disallowed by Government; but that defence failed in the High Court. That, like the present case, related to *ratan* appendant to the office of *Kulkarni*. We affirm the decrees of the Courts below with costs.

Decrees affirmed.

[APPELLATE CRIMINAL JURISDICTION.]

Before Mr. Justice Melvill and Mr. Justice Kemball.

REG. v. HANMANTA,

AND

APPEAL BY THE GOVERNMENT AGAINST THE ACQUITTAL OF
 HANMANTA AND OTHERS.

The Code of Criminal Procedure (Act X. of 1872), Sections 344, 345, 347 452, et seq.—The Indian Penal Code (Act XLV. of 1860), Section 378—The Indian Evidence Act (I. of 1872), Section 32, Clause 2, and Section 34—Joint trial of separate offences—Condonation of irregularity where accused not prejudiced—Account books—Entries by persons having no personal knowledge—Account books kept by a servant or agent of a firm relevant as admissions—Evidence of accused illegally pardoned—Theft.

The accused persons were tried on 27 charges, comprising the offences of theft, abetment of theft, and receiving stolen property, in 1872-73; similar offences in 1873-74; similar offences in 1874-75; the giving and receiving of ratifications to and by public servants in 1874-75; and finally, the fabrication and abetment of fabrication of false evidence in 1876. One of the

(1) 7 Bom. H. C. Rep. 26, A. C. J.

accused was convicted on two heads of charge, and the rest acquitted. The convict appealed against his conviction and sentence; and the Government appealed against his acquittal on the other heads as well as against the acquittal of the rest.

1877.
REG.
v.
HANMANTÁ.

Held that the trial was irregular under Section 452 of the Code of Criminal Procedure; and so would be the hearing of the appeal. The High Court, however, heard the appeal in respect of offences in 1874-75 only, it appearing that this course did not prejudice the accused persons who had been fully and fairly tried for those offences.

Account books containing entries not made by, nor at the dictation of a person who had a personal knowledge of the truth of the facts stated, if regularly kept in course of business, are admissible as evidence under Section 34 of the Indian Evidence Act I. of 1872, and *semble* under Section 32, Clause 2.

Account books, though proved not to have been regularly kept in course of business, but proved to have been kept on behalf of a firm of contractors by its servant or agent appointed for that purpose, are relevant as admissions against the firm.

It is not competent to a Magistrate to convert an accused person into a witness except when a pardon has been lawfully granted under Section 347 of the Code of Criminal Procedure. Evidence given by such a person who had received a pardon in the case of an offence not exclusively triable by the Court of Session, held not relevant, that person not having been acquitted or discharged or convicted.

Possession of wood by a forest inspector, who is a servant of Government, is possession of the Government itself; and a dishonest removal of it, without payment of the necessary fees, from his possession, albeit with his actual consent, constitutes theft, within the meaning of Section 378 of the Indian Penal Code, if that consent was unauthorized or fraudulent.

This was an appeal from the decision of John Jardine, Session Judge of Tháná, at the Kolába Sessions.

Pirozesha M. Mehtá, instructed by *Vishnu Ghanashám*, appeared for Hanmantá, who appealed against his conviction.

Marriott, Acting Advocate General, with him *Honourable V. N. Mundhk*, Acting Government Pleader, and *Shántáram Náráyan* appeared for the Government.

Dinkar Gangádhár appeared for Sakhárám and Máhádáji, two of the accused, against whose acquittal Government appealed.

Máhádev C. Apté appeared for Vishnu and Appáji, two other of the accused, against whose acquittal Government appealed.

The remaining two accused against whose acquittal Government appealed, Hari and Patlia, were unrepresented.

1877 The facts and arguments sufficiently appear from the following
 REG. judgment of the Court delivered by

v.
 HANMANTÁ.

MLLVIII, J. :—In this case fourteen persons were tried in the Sessions Court of Tháná for being concerned in the fraudulent cutting and removal of wood from the Government forests in Alibágh. They were all acquitted with the exception of the first accused, Hanmantá, who was convicted on two out of twenty-seven heads of charge. Against this conviction Hanmantá has appealed. On the other hand the Government of Bombay has appealed against the acquittal of Hanmantá on the other charges, and against the acquittal of twelve out of the remaining thirteen accused persons on all the charges. The appeal against Appáji, No. 14, was withdrawn at the commencement of the hearing, it being admitted that the evidence against him was insufficient for conviction. The Government of Bombay succeeded in serving a notice of the appeal on only six out of the remaining accused-persons: and, therefore, it is only as against these six persons that we have been able to hear the appeal.

At a very early stage of the arguments we were able to come to the conclusion that the conviction recorded against accused No. 1, Hanmantá, could not be sustained. That conviction is for the offence of abetting the fabrication, in Bombay, of false evidence. The Sessions Court had no jurisdiction, unless the abetment took place in the Kolába Collectorate, and the charge accordingly alleges that the abetment did take place in that collectorate. But we find no proof of any act of abetment committed therein by Hanmantá. A letter containing directions for the fabrication of evidence is alleged to have been written by his direction at Alibágh: but it is not proved that it was written by his direction, nor that it was written at Alibágh. The conviction against Hanmantá must, therefore, be reversed, and thereupon his case must be considered in the same way as that of the other persons who are before the Court as respondents.

We have been much embarrassed, in hearing this appeal, by the irregular manner in which the case has been tried in the Sessions Court. Section 452 of the Criminal Procedure Code lays down that there must be a separate charge for every distinct

offence of which any person is accused, and every such charge must be tried separately, except in the cases hereinafter specified." Certain exceptions are mentioned in the two succeeding sections, but they cannot be made applicable to the circumstances of the present trial. In contravention of the provisions of Section 452, the accused persons in this case have been tried on twenty-seven charges, comprising the offences of theft, abetment of theft, and receiving stolen property, in 1872-73; similar offences in 1873-74; similar offences in 1874-75; the giving and receiving of gratifications to and by public servants in 1874-75; and, finally, the fabrication and abetment of fabrication of false evidence in 1876. It was impossible for this Court to hear an appeal against the acquittal on each and all of the above charges; for that would have been virtually to re-try the case in the same irregular manner in which it had been tried in the Court below. After some discussion it was decided that the Advocate General should withdraw his appeal in respect of all the offences alleged to have been committed in 1872-73 and 1873-74, and in respect of the fabrication of evidence in 1876; and that the appeal should be heard in respect of the offences of 1874-75 only. We should not have felt justified in condoning the irregularity in the trial even to this extent, if we had thought that the respondents had been prejudiced by the irregularity. If the effect of including in the trial the offences of 1872-73, 1873-74 and 1876 had been to import into the case a quantity of extraneous evidence, and thus to confuse and embarrass the accused persons in their defence, it would have been impossible to hold that the accused had not been prejudiced. But although the case has assumed such enormous dimensions that it occupied the Sessions Court for 76 days, and that the hearing of the appeal has lasted for 7 days, a very small portion of the recorded evidence could have been rejected as irrelevant, if the trial had been confined to the offences of 1874-75. If the first eleven accused persons had been tried solely for the theft, abetment, and receiving, in 1874-75, it would have been open to the prosecution to show that they had bribed public servants while the theft was going on and had subsequently fabricated false books of account to be substituted for the genuine books of 1874-75: for both these circumstances would have tended to show the dishonest intention of the acts. to conceal which such devices were resorted to

1877.

REG.

v.

HANMANTA.

1877. Evidence as to thefts committed in 1872-73 and 1873-74 would, of course, have been inadmissible: but the evidence on these points forms an insignificant portion of that on the record. On the whole, therefore, as the accused persons have been fully and fairly tried for the offences of 1874-75, and have not been prejudiced by the introduction into the case of any considerable amount of irrelevant matter, we have not thought ourselves debarred from proceeding as if the trial had been held in respect of the offences of 1874-75 only.

REG
v.
HANMANTA

The Advocate General has wished the Court, while confining the appeal to the offences of 1874-75 only, to admit into its consideration all the evidence on the record as bearing upon those offences. To this desire we are only partially able to accede. As we have said, the evidence as to the offences of 1872-73 and 1873-74 must be absolutely rejected as irrelevant. The evidence as to giving bribes to public servants in 1874-75 is in itself relevant; but we are hampered by the difficulty that the first eleven accused persons have been tried for giving these bribes, and acquitted; and that against this acquittal the prosecution, owing to an irregularity for which the prosecution itself is chiefly responsible, is unable to appeal. We think that we should be unduly favouring the prosecution, if we were to allow it to withdraw its appeal against a judgment of acquittal, and at the same time, in order to establish another offence, to introduce a subsidiary issue as to the correctness of the acquittal. We have, therefore, determined to reject from consideration, as against the principal respondents, all evidence as to their having given gratifications to the public servants. The evidence as to the fabrication of false evidence stands on a different footing. This offence is alleged to have been committed in the town of Bombay; and we fail to find in the case any circumstances which could give the Sessions Court of Tháná jurisdiction in respect of the offence. The acquittal of the accused by the Sessions Court in regard to this offence was, consequently, *coram non iudice*, and must be treated as absolutely null and void; and it does not, therefore, prevent this Court from considering, as an issue subsidiary to the main issue, whether the fabrication of evidence is proved to have

The basis, then, on which after much consideration we finally determined to hear this appeal, was this: that the appeal, as against the principal respondents, should be confined to the offences of 1874-75, set forth in the 11th, 13th, and 14th heads of charge: that the evidence as to similar offences in 1872-73 and 1873-74, and also as to the giving of bribes to Government servants, should be excluded from consideration: and that the prosecution should confine itself, in arguing the appeal, to the evidence bearing directly upon the above heads of charge, and to that relating to the fabrication of false evidence.

By the term "principal respondents" we mean the following accused persons, designated by the numbers which they bear in the calendar of the Sessions Court, viz., Hanmantá No. 1, Sakham No. 2, Máhadáji No. 4, Hari No. 7, and Patlia No. 9. The case made by the prosecution against these persons is that they were partners in a contract taken in the name of Hanmantá No. 1 for cutting firewood in the Government forests in Alibágh. The wood was to be brought to certain depôts and there stacked, until the fees due to Government had been paid on it. The contract specified the quantity of wood to cut: but it is alleged that the respondents cut and carried a very much larger quantity than that specified, and that they dishonestly exported a great portion of it without having paid the Government fees. This system is said to have been going on for three years with the connivance of the officials of the Forest Department. Early in 1876, the Magistrate of Alibágh, Mr. Crawford, instituted inquiries into the frauds which had been committed; and thereupon the accused fabricated a false set of account books, with the object of showing that they had not taken from the Government forests, nor exported, any wood in excess of the quantity on which they had paid fees.

The evidence against the principal respondents consists mainly of (1) the accounts of their broker, one Ladak Háji, of Bombay, to whom all the wood was consigned for sale; (2) the genuine accounts of the firm, kept at the different depôts in Alibágh; and (3) the forged books, which it was intended to substitute for the genuine accounts. The two first set of accounts have been rejected by the Sessions Judge, on the ground that they are not shown to have been regularly kept in the course of business. The admissibility or otherwise of these books is the most important ques-

1877.

REG.

v.

HANMANTÁ.

1877
REG.
v
HANMANTÁ.

tion in the case, for the Advocate General admitted at the outset that, if these books were rejected, he could not support his appeal.

The system on which the broker's books were kept is thus described: When any wood received from Alibágh was to be sold, a servant of the broker, named Khemji, went to the bunder and made a memorandum of the quantity weighed and sold. He states that he did not necessarily see the weighing, but that the quantity of wood was certified to him by the weigher, by an agent of the contractor, and by the purchaser. The memorandum so made was taken by Khemji in the evening to the broker's shop, and an entry was then made in the broker's accounts by his clerk Amulak. The objection taken to the accounts by the Session Judge is that the entries in them were not made by, nor at the dictation of, a person who had a personal knowledge of the truth of the facts stated. The English rule of evidence, of which the case of *Bram v. Prece* (1) is the best illustration, is briefly and clearly stated in Mr. Fitzjames Stephen's Digest of the Law of Evidence. "A declaration is relevant when it was made by the declarant in the ordinary course of business, or in the discharge of professional duty, at or near the time when the matter stated occurred, and of his own knowledge." We concur with the Sessions Judge in thinking that this rule would exclude such accounts as those of the broker Ladak Háji. But the Indian rule of evidence (Evidence Act, Section 32, Clause 2, and Section 34) simply requires that entries in accounts should, in order to be relevant, be regularly kept in the course of business: and although it may be no doubt important to show that the person making or dictating the entries had, or had not, a personal knowledge of the facts stated, this is a question which, according to the Indian rule of evidence, affects the value, not the admissibility, of the entries. In the present instance it appears to us that Ladak Háji's accounts were regularly kept in the course of business. When a clerk sitting in a Bombay office keeps accounts of transactions effected at the bunders, or the Cotton Green, he must necessarily make the entries, not from his personal knowledge, but from information supplied to him by some other person. The rule adopted by the Sessions Judge would exclude the accounts of half the merchants

in Bombay. We have no doubt that Ladak Hájí's accounts are admissible in evidence. What their value is, we shall presently consider.

1877 -
REG
v
HANMANTÁ

The second set of accounts, viz., those purporting to have been kept on behalf of the contractor at the different depôts, has been rejected by the Sessions Judge for the same reason, as not being proved to have been regularly kept in the course of business. This might be a good reason for rejecting the accounts, if offered in evidence against any person other than the contractor, or his partners. But, as against the contractor or his partners, the accounts, if proved to have been kept by a servant or agent of the firm appointed for that purpose, are clearly relevant as admissions (Evidence Act, Sections 17, 18, and 21). It is, of course, open to the contractor or any of his partners to show that the entries have been made after such a fashion that no reliance can be placed upon them: but, if made by a clerk of the firm, they are certainly relevant.

Another question of evidence which has arisen in the case, relates to the admissibility of the depositions of two of the principal witnesses, Moro Timbak and Rámchandra Mahipat. These persons, who, according to their own statements, were accomplices in the alleged frauds, were brought before the Magistrate under a warrant purporting to have been issued by him on a charge of theft. They received from the Magistrate a certificate of pardon, purporting to have been granted under Section 347 of the Criminal Procedure Code on condition of their making a full disclosure of all the circumstances within their knowledge. Section 347 authorizes the tender of a pardon in the case of those offences only which are specified in the Schedule of the Code as triable exclusively by the Court of Session. None of the offences to which this trial relates are triable exclusively by the Court of Session; and, therefore, the tender of a pardon was illegal. This circumstance did not escape the notice of the Session Judge. He examined Moro and Rámchandra as witnesses; and then, when their evidence was complete, he informed them that their pardon was invalid, and asked them whether they adhered to the statements which they had made. After some hesitation they replied in the affirmative. The prosecution

1877
 REG.
 v.
 HANMANTÁ.

contends that, even if this evidence were otherwise inadmissible, it is rendered admissible by the circumstance that the witnesses adhered to their statements, even after the promise of pardon had been withdrawn. If it were necessary to decide the point, we doubt if we could hold that the impression caused by the promise of pardon had, under the circumstances which we have stated, been fully removed. But, under the view which we take, we are not called upon to consider this question. Moro and Rámchandra were before the Magistrate as accused persons. Section 314 of the Code lays down that, "except as is provided in Section 347, no influence, by means of any promise or threat or otherwise, shall be used to the accused person to induce him to disclose or withhold any matter within his knowledge." Section 345 prescribes that "no oath or affirmation shall be administered to the accused person." The effect of these sections is to render it illegal for a Magistrate to convert an accused person into a witness, except when a pardon has been lawfully granted under Section 347. Moro and Rámchandra being accused persons, and not having been legally pardoned, could not be examined as witnesses, until they had been acquitted, or discharged, or convicted. Their evidence must, therefore, be rejected as absolutely inadmissible.

In deciding this point we have not lost sight of the English case of *R. v. Rudd*.⁽¹⁾ In that case the question was whether Rudd, an accomplice, who had received a promise of pardon from the justices in a case of forgery, and had been examined as a witness, could be afterwards proceeded against for the forgery. On the one hand it was argued that Rudd was not protected from prosecution, inasmuch as the justices had no power to admit an accomplice in forgery as a witness, forgery not being one of the offences specified in the Statutes 10 and 11 Will. III., C. 23; and 5 Ann., C. 31. On the other hand it was contended that, whether or not the justices had strictly pursued the provisions of the different Acts of Parliament, Rudd had given evidence on the faith of the promise of pardon, and taking it for granted that the justices were perfectly acquainted with

tenance objections founded on nothing less than a breach of public faith. The question was referred for the opinion of all the Judges, and they unanimously held that, in any case not within any statute, an accomplice, who fully and truly discloses the joint guilt of himself and his companions, and truly answers all questions that are put to him, and is admitted by the justices of the peace as a witness against his companions, and who, when called upon, does give evidence accordingly, and appears, under all the circumstances of the case, to have acted a fair and ingenuous part, and to have made a full and true information, ought not to be prosecuted for his own guilt so disclosed by him, nor, perhaps, for any other offence of the same kind which he may accidentally, and without any bad design, have omitted in his confession. It may be inferred, from the report of the case, that Rudd's evidence had been admitted in the original trial without question; but the admissibility of the evidence was not a question before the Judges, and they gave no opinion in regard to it. The case, therefore, would hardly be any authority on the point in England; and it certainly could not affect the decision of the question in this country, in which we have a Code of Procedure, the provisions of which are clear and distinct. We have referred to Rudd's case at greater length than we should otherwise have done, because the Sessions Judge has suggested, though he does not recommend, that the District Magistrate should apply to this Court to cancel the pardons granted to Moro and Rámchandra, and that proceedings should be taken against them. It appears to us that Moro and Rámchandra have given evidence fairly and fully; and the decision in Rudd's case is an authority for holding that they ought not to be prosecuted.

An objection has been taken to the admission of the evidence of several other witnesses in the case, on the ground that they also were persons accused before the Magistrate. These persons were certainly arrested by the Magistrate, Mr. Crawford, on suspicion. But Mr. Crawford in his evidence states that they were discharged as soon as they were brought before him. No formal order of discharge appears upon the record; but it is to be presumed that they were discharged, as the law permits, because there was no evidence against them; and, indeed, it does not

1877. .

REG.

v.

HANMANTÁ.

1877- appear that, at the time when they were discharged, there could
REG have been any evidence of their having committed the offence for
v. which they had been arrested. Although, therefore, some of these
HANMANTÁ. persons were undoubtedly accomplices, they were not accused
persons when they were admitted as witnesses, and we are unable
to say that their evidence is inadmissible.

We come now to a consideration of the evidence which we have thus sifted out as relevant. Every portion of that evidence has been so fully discussed between the counsel on both sides and the Court, during the hearing of the appeal, that it is unnecessary for us to do more than state briefly the conclusions at which we have arrived.

[The learned Judge then reviewed the evidence, and proceeded.]

It having been established to the satisfaction of the Court that Hanmantá No. 1, and Sakháram No. 2, conspired to commit the frauds alleged in the 11th head of charge, it remains to consider whether this fraud can be brought within the definition of theft. In the Court below, and at first in this Court, the prosecution laboured to show that a theft took place when the wood was cut and removed from the forest. But the difficulty of establishing this point induced the Advocate General, at a late stage in the hearing of the appeal, to abandon the ground previously occupied, and to adopt, as constituting the theft, the act of removing the wood from the depôts. It would, no doubt, be difficult, if not impossible, to prove that the dishonest intention commenced with the cutting and removal of the wood from the forests. It is true that the contractor cut much more wood than his contract allowed him to cut: but, by the terms of the contract, this proceeding subjected him only to the obligation of paying the price of the wood cut and a trifling fine. During the three years, over which the contracts extended, the contractor had been allowed to pay fees for more than double the quantity of wood which his contracts entitled him to cut. This must have been reported to Mr. Hewett, the Assistant Conservator of Forests, and he made no objection to it; although he says in his evidence that, had he known of the extent to which the practice was carried, he should have objected to it. It is clear, therefore, that the contractor had

not, during the three years over which the contracts extended, been held to his contracts, but had been allowed to cut as much wood as he pleased, on condition only that he paid the Government fees. After such license, whether express or by ratification, had been for so long a period extended to the contractor by the officer of the Forest Department, it would be difficult to hold that the act of cutting a large quantity of wood necessarily indicated an immediate dishonest intention. Moreover, by the terms of the contract, the contractor was bound to deliver all the wood into the charge of the forest officers at the appointed depôt; and we consider that the evidence shows that this was done. So that, if we were required to find that a theft had been committed in the forests, the prosecution would have to make the somewhat absurd admission that there had been a restoration of the stolen property at the depôts. The Advocate General has, therefore, preferred to abandon this ground of attack, and to base the accusation of theft upon what took place at the depôts; and, fortunately for his argument, the charges in the Sessions Court were so framed as to allow of this change of position being made without it being possible to say that the accused persons are prejudiced or taken by surprise.⁽¹⁾ Confining our attention, then, to what took place at the depôts, we find the regular system of business to be thus described, and no doubt correctly described, by Mr. Hewett:—"When the wood has been felled, it is cut up into billets, which are removed to the depôts specified in the contract. At the depôt the billets are stacked. When there is a large quantity, the assistant conservator comes, if he can, to weigh them. If he cannot, the inspector weighs them; and sometimes the mukadum does it. If the mukadum has done it, it is the inspector's business afterwards to test that weighing. When the weighing is finished, the contractor receives from the inspector a memorandum addressed to the mámlatdár, stating that so many khandis have been weighed and given to the contractor at a certain rate, and that so much money has to be paid in. The contractor

1877 ~
RLG
v.
HANMANTÁ.

(1) The charge of theft in 1874-75 was as follows:—"That you, between the 31st October 1874 and 30th October 1875, did commit theft of certain property, viz., 27,524 khandis of wood, or thereabouts, being the property of Government, from the Government forests of the villages of, &c, in the Kolába Collectorate, and have thereby committed an offence punishable under Section 379 of the Indian Penal Code."

1877
 REG.
 "
 HANMANTÁ

takes the money and the memorandum to the mámlatdár, and pays in the amount mentioned to him. The mámlatdár credits the money, and tells the inspector that he has received so much money. After the reply of the mámlatdár, the contractor obtains possession of the wood." From his statement two facts appear perfectly clear, viz., first, that the wood, when stacked at the depôts, was in the possession of the forest inspector, until the fees were paid; secondly, that the contractor could not lawfully remove any of the wood until the fees had been paid. The definition of theft in the Indian Penal Code is the following:—"Whoever, intending to take dishonestly any moveable property out of the possession of any person, without that person's consent, moves that property in order to such taking, is said to commit theft." It has been argued for the defence that the contractor had the consent of the forest inspector, in whose possession the wood was, to its removal. That is probable enough; for the removal of the wood could hardly have taken place without the consent of the inspector, and it is in evidence that the inspector, Dwárákáth Sakhárám, made a false report to Mr. Hewett as to the quantity of wood, and he seems to have absconded when the frauds were discovered. But the fraudulent consent of the inspector does not affect the case against those concerned in the dishonest removal of the wood. The inspector was a servant of Government, and the wood was in his possession on account of Government. By Section 27 of the Penal Code, "when property is in the possession of a person's wife, clerk, or servant, on account of that person, it is in that person's possession within the meaning of the Code." The definition, in Section 11, of the word "person" is sufficiently wide to include the Government as representative of the whole community. The possession, therefore, of the inspector was the possession of Government, and a consent, which he was not authorized to give cannot be construed in favour of the accomplice of his breach of trust into the consent of Government. The respondents Hanmantá and Sakhárám are shown to have entered into a conspiracy to remove certain wood, intending thereby dishonestly to take it out of the possession of Government without the consent of Government. The removal of the

The only respondent whose case we have not yet considered is Vishnu, accused No. 13. He was a forest mukadum temporarily employed in 1874-75. He is charged with receiving bribes amounting to Rs. 54. The only evidence on this point is that of the accomplice Raghunath, whose statement is not corroborated, but contradicted, by the contractor's accounts, in which the sums alleged by Raghunath to have been paid to Vishnu are entered as paid to one of the partners of Hanmantá. It may be, as Raghunath says, that this was a false entry, intended to disguise the real truth : but the question is whether the statement of the accomplice is corroborated, and it is clear that the accounts contain no corroboration. Vishnu is further charged with allowing the contractor to cut wood in the forests which ought not to have been cut : but, for reasons which we have already stated, this cannot be construed into abetment of theft, the prosecution having abandoned the allegation that the cutting and removal of the wood from the forests constituted theft. Finally, Vishnu is accused of having by omitting to weigh some wood altogether, and by a fraudulent method of weighing other wood, assisted the contractor in the theft committed at the depôts ; and if this could be established against Vishnu, the offence of abetment would be made out. But the only evidence on the point is that of the accomplice Raghunath, and of Krishna, a sepoy in the Forest Department. All the assessors recorded their opinion that " Krishna Sepoy is not in the least to be believed," and the Sessions Judge regarded him as no better than an accomplice. The Sessions Judge was strongly of opinion that the whole story about the false weighing was a concoction, and that it had been worked up by the accomplices after the Magistrate had examined them. Without saying that we concur in this view, we think that, when the prosecution asks this Court to reverse judgment of acquittal, it ought to be able to show some stronger evidence than the statements of an accomplice and of a witness who was entirely disbelieved by the Sessions Judge and the assessors.

We reverse the conviction and sentence recorded against Hanmantá, accused No. 1, in the Sessions Court.

We reject the appeals made by the Government of Bombay against the judgment of acquittal recorded by the Sessions Court

1877

REG

v.

HANMANTÁ

1877 in the instance of Mahadaji, accused No. 1, Hari, accused No. 7,
 REG. — Patla, accused No. 9, and Vishnu, accused No. 13.
 v.
 HANMANTA The appeal by the Government of Bombay against the judgment
 of acquittal recorded by the Sessions Court in the instance of
 Appaji, accused No. 11, has been permitted to be withdrawn.

The Court finds that Hanmantá, accused No. 1, and Sakharám, accused No. 2, between the 31st October 1874 and the 30th June 1875, abetted the commission of theft at Chowre, Shervai, and Shilosi, in the Alibág Collectorate, of about 8,000 khandis of wood, the property of the Government of Bombay, and that they have thereby committed an offence punishable under Sections 379 and 109 of the Indian Penal Code.

And the Court directs that the said Hanmantá and Sakharám be rigorously imprisoned for two years, and that they do each pay a fine of one thousand rupees, or, in default, do undergo rigorous imprisonment for a further period of nine months.

The sentence of imprisonment on Hanmanta No. 1 is to commence from the date in which he was sentenced by the Sessions Court.

[APPELLATE CIVIL JURISDICTION.]

Before Sir M. R. Westropp, Kt., Chief Justice, and Mr. Justice Nánábhái Haridás.

BASAPA BIN MURTIAPA (DEFENDANT NO. 1 AND APPELLANT) v.
 LAKSHMAPA BIN MARITAMPAPA (PLAINTIFF AND RESPONDENT).*

March 6

Mámlatdár's order under Bombay Act V. of 1864—Possession—Revenue Courts—Bombay Act III of 1876—Act XVI of 1888, Section 1, Clause 2.

A Mámlatdár's order under Bombay Act V. of 1864 is not conclusive evidence of the facts of possession and dispossession between the parties. Section 1 of that Act gives to Mámlatdárs' Courts jurisdiction in case of dispossession within six months from the date of such dispossession, and relates to immediate possession, and under Section 15, the party to whom such immediate possession is given by the Mámlatdár, or whose possession he shall maintain, shall continue in possession until ejected by

The power reserved to the Revenue Courts by Section 1, Clause 2, of Act XVI of 1838, to determine the facts of possession and dispossession, was so reserved merely for the temporary purpose of enabling those Courts to dispose of the immediate possession, which was to continue until the Civil Court ejected the party put into such immediate possession. The purpose of Act XVI. of 1838, as that of Bombay Act V. of 1864, was temporary only, and chiefly to provide for the cultivation of the land and to prevent breaches of the peace until the Civil Court should determine the rights of the disputants. The decisions of the Revenue and the Mámlatdár's Courts as to possession and dispossession do not bind the Civil Courts, the proceedings in the former Courts being of a summary character. The Civil Courts alone can entertain the question of title.

Ex parte Nagova (3 Bom. H C Rep 108, A C J) distinguished

THIS was a special appeal from the decision of N. Daniel, District Judge of Dharwad, amending the decree of Shivaram Ramchandra, 2nd class Subordinate Judge at Gadag.

This action was brought by Lakshmápa against Basápá bin Murtiápá and Basápá bin Shivápá to recover possession of certain land. The plaintiff alleged that he had purchased it from defendant No 2 on the 4th July 1872; that he had obtained possession of the land, but that on the 7th December 1872 was ejected by an order of the Mámlatdár on the application of defendant No. 1, whom the Mámlatdár put into immediate possession under Bombay Act V. of 1864. Defendant No. 1 among the other objections pleaded that the land in dispute had been mortgaged to him by defendant No. 2 on the 1st June 1863 for Rs. 200, and that defendant No 2 had no title whatever left in the land at the time when he (defendant No. 2) sold it to plaintiff. Defendant No 2 admitted the sale of the land to plaintiff, but denied the mortgage set up by defendant No. 1. The Subordinate Judge held both the sale to the plaintiff and the mortgage to the defendant No. 1 proved, and awarded the land to the plaintiff on condition of his (plaintiff's) paying Rs 200 to defendant No 1 in satisfaction of the latter's mortgage lien. In the appeal, which was preferred by the plaintiff, the District Judge held the mortgage to defendant No. 1 not proved, and, amending the decree of the first court, awarded the land to the plaintiff as claimed in the plaint.

In special appeal only two points were raised, viz., 1st, that the Mámlatdár's order was binding on the Civil Court on the question of the title to the land, and, 2nd, that the plaintiff purchased with notice of the mortgage.

1877

BASÁPÁ BIN
MURTIAPÁ

v.

LAKSHMÁPA
BIN MÁRI-
TAMÁPA

1877.

Mānekshāh Jehangīrshāh appeared for the special appellant.BASÁPÁ BIN
MURTIÁPÁ*Shāntārām Nārāyan* appeared for the respondent.v.
LAKSHMÁPÁ
BIN MARI-
TAMAPÁ,

The arguments used and the authorities cited in special appeal will appear from the following judgment delivered by

WFSTROPP, C.J.:—The special appellant's learned pleader has raised two points—1st, that the land in dispute having been decided under Bombay Act V. of 1864 by the Māmlatdār to have been in the possession of the special appellant (defendant No. 1, Basápá Murtiápá) under the mortgage bond by the second defendant (Basápá Shivápá) of the 1st June 1863, his decision could not be questioned in the present suit on the title, and in *Lingupá v. Irápá* ⁽¹⁾ a Māmlatdār's order, under Act V. of 1864, was treated as conclusive evidence of the facts of possession and dispossession. We, however, do not think that we could adopt that view of the law. The case there cited (*ex parte Nagora* ⁽²⁾) does not appear to us to be an authority to that effect. It, in fact, merely decided that a Munsif's Court had, as well as a Māmlatdār's Court, jurisdiction to entertain a suit for restitution of possession of land of which the plaintiff had been dispossessed within six months previously to the institution of his suit in the Munsif's Court. The power, reserved to the Revenue Courts by Section 1, Clause 2, of Act I. of 1838, to determine the facts of possession and dispossession was so reserved merely for the temporary purpose of enabling those Courts to dispose of the immediate possession, which was to continue only until the Civil Court ejected the party put into such immediate possession. Bombay Act V. of 1864, which gives to Māmlatdār's Courts jurisdiction in cases of dispossession within six months from the date of such dispossession, also relates to immediate possession (Section 1), and provides that the party to whom such immediate possession is given by the Māmlatdār, or whose possession he shall maintain, shall continue in possession until ejected by a decree of a Civil Court (Section 15). The purpose of this Act, like that of Act XVI. of 1838, was temporary only, and, as we think, chiefly to provide for the cultivation of the land and to prevent breaches of the peace until the Civil Court

should determine the rights of the disputants. Neither of these 1877. *
 Acts gave any appeal against the Mámlatdárs' or Revenue Courts' BAŚÁPÁ BIN
MURTIÁPÁ
 decisions, which we think the Legislature would have permitted if v.
LAKSEMA'PÁ
BIN MÁRI-
TAMÁPÁ.
 it intended the decisions of the Revenue and Mámlatdárs' Courts as to possession and dispossession to bind the Civil Courts. The proceedings in those courts were of a very summary character, and it is important to observe that the question of possession is often inextricably mixed up with the question of title, which the Civil Courts only can entertain; or, in other words, the title often depends upon the possession. This is especially so amongst Hindus, where possession is frequently indispensable to title: also amongst Muhammadans where the validity of *hibas* is concerned; and see such cases as *Balaram Nemchand v. Appá Dullu*,⁽¹⁾ *Manmal Dashrath*,⁽²⁾ and cases in which the sale or letting has been oral. The second proviso, in section 18 of Bombay Act III. of 1876, which enacts that the Mámlatdár's order is not to be conclusive respecting possession of property or the enjoyment of any use, we regard as introduced *pro majori cautela*, and not as affording any inference that, under Act XVI. of 1838, or Bombay Act V. of 1864, it was conclusive. Further, neither this point as to the conclusiveness of the Mámlatdár's order, nor the special appellant's second point, that the purchase, by the plaintiff, in July 1872 was made with notice of the special appellant's mortgage of 1863, is taken in the memorandum of special appeal, and there does not seem to have been any good reason for taking the latter point, inasmuch as the District Judge has found that the plaintiff gave the full money value for the property, which it is not probable that he would have done if he were aware of the mortgage. We affirm the decree of the District Judge with costs.

Decree affirmed.

(1) 9 Bom. H. C. Rep. 121.

(2) 9 Bom. H. C. Rep. 147

[APPELLATE CIVIL JURISDICTION.]

*Before Sir M. R. Westropp, Kt., Chief Justice, and Mr. Justice
Dhanubhai Hanudas.*

1877
March 6

GANGADHAR SHIVKARN (PLAINTIFF AND APPELLANT) v. THE COLLECTOR OF AHMEDNAGAR AND OTHERS (DEFENDANTS AND RESPONDENTS) *
Municipal Commissioner—Collector—District Magistrate—Acts done in public capacity—Act XXVI of 1850—Act XIV. of 1869, Section 32—Bombay Act VI of 1873 Section 86—Jurisdiction

Where the acts complained of by the plaintiff were committed by the Collector of a district, appointed Municipal Commissioner, under Act XXVI. of 1850, section 6, in his official capacity of District Magistrate, and before Bombay Act VI of 1873 came into force,

Held, that the Municipal Commissioner was an officer of Government within the meaning of section 32 of Act XVI of 1869, and ought to be sued in the Court of the District Judge and not in that of a Subordinate Judge.

Quære—Whether a suit under Bombay Act VI of 1873 must be commenced in the District Court.

THIS was a special appeal from the decision of A. Bosanquet, District Judge of Ahmednagar, reversing the decree of Purushotamráv Sidheshvar, 1st Class Subordinate Judge at the same place.

The suit was brought by the plaintiff Gangádhār against the Collector as President, and the Members of the Municipality of Ahmednagar, together with six other persons who had erected stalls by the orders of the Municipality, on ground in front of the plaintiff's shop, for the removal of the stalls, and to recover damages sustained by the plaintiff by their erection. The plaint was filed in the Court of the 1st Class Subordinate Judge on the 4th December 1874. The orders which constituted the plaintiff's causes of action were given by the Municipality on the 4th and 14th May and 5th June 1873. The Collector pleaded that the acts complained of were done by him in his official capacity as Collector and President of the Municipality, and that therefore the Subordinate Judge had no jurisdiction to entertain the suit under section 32 of Act XIV. of 1869. The members of the Municipal Committee pleaded justification of the acts done, and absence of a notice from the plaintiff, as required by section 86 of Bombay Act VI. of 1873, one month before date of the suit. The Subordinate Judge held that he had jurisdiction to try the suit, and

that it was not barred by section 86 of the Bombay Municipal Act. He accordingly, passed a decision in favour of plaintiff for Rs. 339-13-6 on account of damages, and directed removal of the stalls complained of. In appeal, the District Judge held that, as the plaint was presented on the 4th of December 1874, Bombay Act VI. of 1873 applied to the case, and that the action was barred; as plaintiff gave no notice to the defendants as required by section 86 of that Act.

1877
GANGADHAR
SHIVKARN
v
THE COL-
LECTOR OF
AHMED-
NAGAR

The special appeal was argued only on the point of the jurisdiction of the Subordinate Judge to try the suit.

Shushankar Govindram appeared for the appellant.

The Honourable Rao Sahib V. N. Mandlik, Acting Government Pleader, appeared for the respondents.

WRESTROPP, C J. —The acts alleged to have been committed by the respondents, and which are complained of by the special appellant as plaintiff, were so committed before Bombay Act VI. of 1873 came into force. The District Judge, therefore, was mistaken in supposing that its 86th section is applicable to this suit. The enactment, which is applicable to it, is Act XXVI. of 1850, which does not contain any provision as to notice of action.

But the Government Pleader has renewed an objection to the jurisdiction of the Subordinate Judge, made in his Court, but not apparently repeated in the District Court. To that objection, founded on section 32 of the Bombay Courts' Act XIV. of 1869, we must yield, inasmuch as we think that the Collector was, in his official capacity of District Magistrate, a member of the Municipality, under the 6th section of Act XXVI. of 1850, when the causes of action accrued; and, therefore, the reasoning in *Narsing Rao v. Luxuman Rao*⁽¹⁾ is applicable, and see also *Greaves v. Bhagwan Tulsi*⁽²⁾. Upon the possible question—whether a suit, under the new Bombay Act VI. of 1873, must be commenced in the District Court—we do not now give any opinion. It may, perhaps, be argued that section 5 of that Act merges the individuality of the members of the new municipalities in the corporation thereby created, and empowered to sue and be sued in its corporate name. As we have already said, this suit must be regulated by Act XXVI. of 1850.

(1) 1 L. R., 1 Bom 318

(2) 4 Bom H. C. Rep 93, A. C. J.

1877

GANGADHAR
SHIVKARNv
THE COL-
LECTOR OF
AHMED-
NAGAR

We reverse the decrees of the Courts below, and remand this cause to the Subordinate Judge, in order that he may refer the plaintiff, pursuant to section 32 of Act XIV. of 1860, to the District Judge, in whose Court the plaint must be presented. The District Judge should proceed in the cause in the ordinary way as upon the institution of a new suit, and should have regard to this judgment. The costs already incurred in the Subordinate Judge's and District Judge's Courts and in this special appeal must abide the final result of the cause.

Decrees reversed.

[APPELLATE CRIMINAL JURISDICTION.]

Before Mr. Justice Kemball and Mr. Justice Nanabhai Hardas.

March 8

In re ANNAPURNABAI

The Code of Criminal Procedure (Act X. of 1872), Chapter XXX—Property alleged to be stolen—Its restoration—Order for its disposal by 2nd Class Magistrate—Reversal of the order by the Magistrate of the District—The effect of reversal.

A was charged before the Police with theft of certain [property. The Police considered that no theft had been committed, and reported the matter to a 2nd Class Magistrate, who, agreeing with the Police, ordered the property to be restored to A. On application by the complainant, the District Magistrate found that A had removed, though not dishonestly, the property from B, a deceased person; and ordered the property to be given by the Police to B's heirs. It was so given.

Held that the provisions of Chapter XXX of the Code of Criminal Procedure do not apply to such a case. Sections 415, 416, and 417 contemplate proceedings preliminary to, and independent of, inquiry. Upon general principles, where there has been an inquiry or a trial, and the accused person is discharged or acquitted by any Criminal Court, that Court is bound to restore that property into the possession of the person from whom it is taken, unless, as provided for by Section 418, such Court is of opinion that "any offence appears to have been committed" regarding it, then such order as appears right for the disposal of the property may be made.

The High Court cannot direct the restoration of the property already delivered by the Police under the illegal order of the District Magistrate.

This was a reference by W. Wedderburn, Session Judge of Thaná, under section 296 of the Code of Criminal Procedure.

The circumstances of the case are as follows :—

One Annapurnabái and her brother Hari Vithal Patwardhan lived in the same house and carried on business together. On the death of the latter, Annapurnabái—as she herself admitted—took away a number of documents in his name and lived separate from his widow, Rakhmábái. Purshotam, the brother of Rakhmábái, charged Annapurnabái before the chief constable of Kalyán with having committed theft of those documents. The chief constable, after making such inquiries as he deemed necessary, reported, on the 27th of April 1876, to the 2nd Class Magistrate of Kalyán, apparently under section 127 of the Code of Criminal Procedure, that, in his opinion, no theft had been committed. Pending the orders of the 2nd Class Magistrate, the constable kept the documents in his own possession.

1877

*In re ANNA-
PURNÁBÁI.*

On the 6th of May following, the 2nd Class Magistrate directed the chief constable to examine both Annapurnabái and Rakhmábái. On the 12th and 23rd some further information was sent for and obtained ; and on the 19th June 1876 the 2nd Class Magistrate passed the following order :—

“ No one states that the documents alleged to have been stolen were stolen by Annapurnabái from the possession of Rakhmábái. When Rakhmábái's husband was alive, the documents were in the possession of Annapurnabái, who had the key of the box. When the Police made inquiry, Annapurnabái produced them, and from the evidence it appears that Annapurnabái and Rakhmábái's husband carried on money dealings together, and that they lived together. This, therefore, appears to be a matter of civil dispute. It is not, therefore, necessary to take further steps. A record may be kept, and the documents returned to the person from whose possession the Police obtained them, and a receipt should be sent.”

Dissatisfied with this order, Rakhmábái's brother, Purshotam, petitioned the Magistrate of the district, who, by an order dated the 28th of June 1876, stopped the delivery of the documents to Annapurnabái, and, subsequently, by an order, dated the 11th July 1876, addressed to the 2nd Class Magistrate of Kalyán, directed the Police to make the documents over to the heirs of Hari Patwardhan. In this order the District Magistrate says that there is no evidence to show that Annapurnabái stole the documents

1877 from Hari's possession, but that "Annapurnabái in her state
 ment says she took them from the possession of the deceased
 The documents are in the name of the deceased, and, therefore
 orders should be issued to the Police to make over the documents
 to his heirs. She alleges that the money mentioned in the docu-
 ments is hers, and if there be evidence that the documents were
 executed in the name of Hari, she being a woman, steps may be
 taken in the Civil Court against the heirs of Hari."

In accordance with these orders the chief constable (on the 26th
 July) reported that he had handed over the documents to Rakh-
 mabái and taken a receipt.

The Court of Session at Tháná, on the application of Anna-
 purnabái, called for the record of the case under section 295 of
 Code of Criminal Procedure for the purpose of satisfying itself as
 to the legality of the order passed by the District Magistrate.
 At the hearing of the case Annapurnabái's vakil contended that
 the order of the 2nd Class Magistrate was passed under sec-
 tion 415, the documents having been seized by the Police on the
 allegation that they had been stolen; and that there was no appeal
 against an order so passed. No inquiry having been held by any
 Magistrate, and no offence having been committed, the District
 Magistrate had no power to interfere with the order of the 2nd
 Class Magistrate.

The Session Judge, Mr. Wedderburn, being of opinion that this
 contention was valid, referred the proceedings, under section 296 of
 the Code of Criminal Procedure, for the orders of the High Court.

There was no appearance on behalf of either party.

PER CURIAM:—It appears to the Court that the provisions of Chap-
 ter XXX of the Code of Criminal Procedure do not apply to such a
 case. Section 415 and the two succeeding sections contemplate
 proceedings preliminary to and independent of inquiry. Upon
 general principles where there has been an inquiry or a trial, and
 the accused person is discharged or acquitted by any Criminal
 Court, that Court is bound to restore the property, the subject
 matter of the investigation, into the possession of the person
 from whom it is taken, unless, as provided for in section 418,

committed" regarding it, when such order as appears right for the disposal of the property may be made. It is clear that the 2nd Class Magistrate did not consider that any offence had been committed in respect of the property in question: therefore, Section 419 gave the District Magistrate no jurisdiction to interfere. On this ground the Court will cancel his order. Whatever may have been the merits of the case, the Magistrate of the District had no sort of right to assume to himself the functions of a Civil Court.

It is to be regretted that the Court is unable to afford to the applicant any adequate remedy for the wrong done her.

Order cancelled.

[APPELLATE CIVIL JURISDICTION.]

Before Sir M. R. Westropp, Kt, Chief Justice, and Mr. Justice Melvill.

JAMAL WALAD AHMED (PLAINTIFF AND APPELLANT) *v.*
JAMAL WALAD JALLAL AND OTHERS (DEFENDANTS AND RESPONDENTS) * April 5.

*Muhammadan Law—Appointment of a Kazi—Qualification for that office—
Regulation XXVI of 1827—Act XI. of 1864*

The enactment of Bombay Regulation XXVI. of 1827 was adverse to any supposition that the office of Kazi could be hereditary. The repeal of that Regulation by Act XI. of 1864 left the Muhammadan Law as it stood before the passing of that Regulation, and that law sanctioned no grant of such an office to a man and his heirs.

The appointment of Kazi lies exclusively with the sovereign, or other chief executive officer of the State, and ought to be made with the greatest circumspection with regard to the fitness of the individual appointed, and though the sovereign may have full power to make the *vatan* attached to the office of Kazi hereditary, yet he has, under the Muhammadan Law, no power to make the office itself so.

In the absence of an established local custom to that effect, the office of Kazi is not hereditary. *Quære*—Whether such a custom would be valid?

* Special Appeal No 343 of 1876.

1877

JAMAL
WALAD
AHMED
v
JAMAL
WALAD
JALLAL

THIS was a special appeal from the decision of G. Druitt, Assistant Judge at Dharwad, affirming the decree of Shrinivas Rao Krishna, 2nd Class Subordinate Judge of Hávri. The plaintiff, claiming through the original grantees of two *sanads* of 1639 and 1663, sued to establish his hereditary right to officiate as Kazi of Hávri, in which he alleged he had been disturbed by the defendants. Both the Lower Courts dismissed the suit, the Subordinate Judge being of opinion that it was barred by the Law of Limitation, and the Assistant Judge, in appeal, being of opinion that the suit was not maintainable, for the reasons given in the following extract from his judgment:—

“I am in doubt whether such an action as this can be maintained after the repeal of Regulation XXVI. of 1827 by Act XI. of 1864. No cases have been decided by the High Court since the passing of that Act. In this district such claims have been awarded as a matter of course, but in the case of the Kazi of Bombay, *Muhammad Yussub v. Sayad Ahmed*,⁽¹⁾ I find that Sausse, C.J., decided that appointment by the Government was an essential condition of holding the office of Kazi, and he further stated distinctly that he did not decide that the presence of the Kazi was necessary for the legality of marriages among Mussalmans. Considering these opinions, I should hesitate to decide that this claim would lie.”

Shámráv Vithal for the appellant:—The Lower Court was wrong in holding that the suit was not maintainable because Regulation No. XXVI. of 1827 was repealed. On the contrary, if that Regulation had not been repealed, it would have barred the present action on the ground that the plaintiff or his predecessor in title did not hold a *sanad* from Government as required by Section 1, Clauses 1 and 2 of that Regulation. But the repeal of that enactment has dispensed with the necessity of such a *sanad*. The law relating to the office and appointment of a Kazi is fully discussed in *Muhammad Yussub v. Sayad Ahmed*.⁽²⁾

The plaintiff bases his claim upon two *sanads*, which were granted by the then ruling sovereign two persons under whom the

plaintiff claims. These *sanads* were granted, respectively, in A D 1639 and 1663. They clearly show that the office of Kazi was granted hereditarily.

Shántarām Narayan for the respondent — Regulation XXVI. of 1827 was based upon the principal of Muhammadan Law regarding the appointment of a Kazi. It is a matter of regret that that enactment is repealed, as observed in *Sayad Abdul v. Sayad Hasham* ⁽¹⁾ What was awarded in that case was inám land attached to the office of Kazi, and not the office itself.

WESTROPP, C J :—This suit is brought for a declaration of the right of the plaintiff to be Kazi of the taluka of Hávri in Dharwad, and to recover certain fees appertaining to that office received by the first defendant from the second and third defendants, and to restrain the first defendant from disturbing the plaintiff in that office.

The plaintiff claims under *sanads* of 1049 Hijri (A D. 1639) and 1074 Hijri (A.D. 1663), purporting to be granted by the Bijápur Government to persons whom he alleges to have been his ancestors. Those *sanads* rather treat the grantees as Kazis already than assume to create them Kazis, and confer land and other benefits upon them in respect of a *musjid* established, or to be established, by them, and for lighting the same, and for the reading of prayers and sacred books, as well as performing the usual duties of Kazis, and would appear to contemplate the maintenance of the *musjid* and the reading of prayers, and performance of the duties of Kazis, as well by the descendants of the grantees as by the grantees themselves.

Sayad Abdul v. Sayad Hasham,⁽²⁾ decided on the 4th October 1876, has been mentioned to us, but that suit was for the recovery of land in the taluka of Gadag and district of Dharwad granted by *sanad* of A D. 1660 in inám to Sayad Kale Mula, who combined the offices of Khatab (preacher) and Kazi, and was not such a suit as we have here, viz, for a declaration of the plaintiff's exclusive right to the office of Kazi in the taluka of Hávri, and for fees paid by the second and third defendants to the first

1877 •

JAMAL
WALAD
AHMED
v
JAMAL
WALAD
JALLÁL

(1) Sp. Ap. 56 of 1873, *vide* note *infra*.

(2) Sp. Ap. 56 of 1873, *vide* note *infra*.

- 1877

JAMAL
WALAD
AHMEDv
JAMAL
WALAD
JAITAL.

defendant for duties performed by him as a Kazi in the taluka of Hávri. and for an injunction against his disturbance of the plaintiff in his alleged office. In the Gadag case, moreover, proof of custom, that the office of Kazi had been enjoyed hereditarily for 200 years together with the mām, was given. It was not, however, in that case decided that the defendant of the *sanad* Kazi could have maintained an action for fees against an alleged intruder, or that the sovereign could grant such an office so as to be held hereditarily. It was only decided there that the plaintiff was, as the heir of the grantee named in the *sanad* of A.D. 1660, entitled to recover the land. Possibly, a local custom to enjoy such an office hereditarily might be established. Whether it could be so or not it is unnecessary for us now to decide, and we do not express any opinion upon that point. The Muhammadan Law does not seem to regard the office of Kazi as hereditary. No authority has been cited to us to show that the creation of an hereditary Kaziship can be sustained. In the *Hidaya*, Vol. II, Book XX, Chapter I, it is said. "It is incumbent on the Sultan to select for the office of Kazi a person who is capable of discharging the duties of it and passing decrees; and who is also in a superlative degree just and virtuous; for the prophet has said: 'Whoever appoints a person to the discharge of any office whilst there is another amongst his subjects more qualified for the same than the person so appointed, does surely commit an injury with respect to the rights of God, the Prophet, and the Mussalmans.'" This shows that high personal qualifications are to be carefully sought for by the appointing power,—a moral injunction which would be frequently defeated if the office were made hereditary. There is not a hint, in the chapter on Kazis in the *Hidaya*, that the office can be made hereditary. The enactment of Bombay Regulation XXVI. of 1827 seems to have been adverse to any supposition that the office of Kazi could be hereditary. That enactment was repealed by Act XI of 1864; but that repeal leaves the law as it stood before Regulation XXVI. of 1827 was passed, and we have not any reason for thinking that the Muhammadan Law sanctioned a grant of such an office to a man and his heirs. It is quite clear from the *Hidaya*, and the very carefully considered

case of *Muhammad Yussub v. Sayad Ahmed*,⁽¹⁾ and the authorities there cited, that the appointment of Kazi lay exclusively with the sovereign or other chief executive officer of the State, and, as we have already said, it was to be exercised with the greatest circumspection with reference to the fitness of the individual appointed.

The present plaintiff has neither proved, nor alleged any local custom in Hávri, that the office of Kazi should be hereditary. Nay, more, he failed in 1855 in an attempt by suit, grounded on the *sanads* upon which he relies here, to prevent Imam Saheb, a near relative of the first defendant, from disturbing the plaintiff in his alleged office of Kazi. In referring to that circumstance we are not to be understood as giving any opinion whether Imam Saheb, or the first defendant, or their kinsman Badrudin, mentioned in the first defendant's written statement, has any valid title to officiate as Kazi. Our decision simply is that the ordinary Muhammadan Law does not recognize hereditary Kazis, and that there are not any circumstances in this case which lead us to think that there is a local custom in Hávri opposed or constituting an exception to the ordinary rule of Muhammadan Law as to Kazis. It is unnecessary for us to say whether, if this had been a suit for the *vatan* granted by the *sanads* of A.D. 1639 and A.D. 1663, we might not have adopted the same course which the Court in the Gadag case did. The sovereign may have had full power to make the *vatan* hereditary, though he may not have such power to make the office of Kazi so. It is sufficient for us to say that, this not being a suit for land, but in respect of a disturbance in an alleged hereditary and exclusive office, we see no reason for holding that the plaintiff has established his right to hold that office hereditarily and in opposition to the ordinary law of his co-religionists. On these grounds we affirm the decrees of the Courts below, and with costs of suit and both appeals. This Court concurs in the observation of the Division Bench which decided the Gadag case, that it is to be regretted that the Government should, by the repeal of Regulation XXVI. of 1827, have abnegated their function of appointing a Kazi, and so quieting the dissensions frequently prevalent amongst Mussalmans as to the validity of the title of persons assuming the office of Kazi—

1877. °

JAMAL
WALAD
AHMED
v.
JAMAL
WALAD
JALLAL.

- 1877. an office which, the Mussalman Law itself ordains, can only be conferred by the State.

JAMAL
WALAD
AHMED
v.
JAMAL
WALAD
JALLAL.

Decree affirmed.

NOTE.—The following is the judgment of the High Court (MILVILL and KEMBALL, J.J.) in [the case of *Sayad Abdul v. Sayad Hasham* above referred to:—

The District Judge has found, as a fact, that Bibi Shah held the lands during her life and appointed persons to perform the duties of Kazi; but that she did this with the consent of the plaintiff's father, and by virtue of a custom which allows to the widows of Kazis a life interest in the office. Under these circumstances, we think that the District Judge has rightly held that Bibi Shah's possession was not adverse to the plaintiff, and that his cause of action did not arise till her death.

A decision on the merits is rendered difficult by the very incomplete character of the evidence. A grant of a certain inám (including the field in dispute) was made in 1660 to Sayad Kali Mula, who combined the offices of Khatib, or preacher, and Kazi. The grant directs that the inám shall be continued to the children of the grantee, and to his grand-children or family (for that appears to be the meaning of the somewhat vague word "Ahfád"). There is no distinct provision for the creation of an hereditary office or offices; but there can hardly be any doubt that the inám was for the maintenance of the office or offices, and that the intention of the grantor was that the office or offices, with the inám, should continue in the grantee's family. It is not denied that such has been the case for the last two hundred years. There is nothing to show how during that time the Khatibs and Kazis have been selected; but they have always been chosen from two branches of Sayad Kali Mula's family. The plaintiff is already Khatib, and in possession of the greater part of the inám. The last male holder to the Kaziship was Mira, Bibi Shah's husband, and on Bibi Shah's death there is no one in that branch of the family capable of holding the appointment. There is, as appears from the pedigree, no male descendant of Sayad Kali Mula surviving, except the plaintiff and a younger brother, who does not appear to dispute his title. The District Judge has found, as a fact, that the defendant is not a member of the family. Under these circumstances, we think that plaintiff has a better right than any one else to perform the duties of Kazi, and to enjoy the inám attached to the office. He is the principal surviving member of the grantee's family. He is already Khatib. He is recognized as officiating Kazi by a portion of the Muhammadan community, though some of them seem to adhere to the defendant. It is, we think, to be regretted that the Government should, by the repeal of Regulation XXVI. of 1827, have abnegated their function of appointing a Kazi, and so quieting the dissensions always prevalent among Mussalman communities; but in the absence of any appointment by the Government, we

[APPELLATE CRIMINAL JURISDICTION.]

Before Mr. Justice Melvill and Mr. Justice Kemball.

REG. v. BALAPÁ BIN DUNDAPÁ AND OTHERS.*

1877.
April 26.

*Murder—Culpable homicide not amounting to murder—Reference—Appeal—
Power of High Court to alter finding—Code of Criminal Procedure (Act
X. of 1872), Section 288.*

Under section 288 of the Code of Criminal Procedure, the High Court, to which a reference is made by a Court of Session for confirmation of a sentence of death on conviction of murder, cannot, in the absence of an appeal, alter the conviction to one of culpable homicide not amounting to murder, if it be of opinion that the evidence does not establish the former but the latter offence. It must order a new trial for that purpose.

Where the prisoners were tried on two charges of murder and culpable homicide not amounting to murder, and the opinion of the assessors was taken on both charges but the Session Judge being of opinion that the evidence established the former charge, recorded a conviction and sentence for murder only, the High Court being of opinion, on a reference under section 287 of Act X. of 1872, that the offence proved was culpable homicide not amounting to murder, did not order a new trial *ab initio*, but directed the Session Judge to complete the trial by recording a finding on the second charge of culpable homicide not amounting to murder.

THE three accused were tried by W. Sandwith, Session Judge at Dharwad, and two assessors on charges of murder and culpable homicide not amounting to murder. The assessors expressed their opinions on both the charges, and the Session Judge being of opinion that the evidence established the graver offence, convicted the accused of murder, and sentenced them to death, but did not consider it necessary to proceed further on the minor charge. Under Section 287 of the Code of Criminal Procedure the proceedings were referred to the High Court for confirmation, but the convicts preferred no appeal.

Prisoners Nos. 2 and 3, Máhádevápá and Apana, in company with their relative, prisoner No. 1, Balápá, went, according to the finding of the Court of Session, to the house of a prostitute with whom their step-brother Dundapá was sleeping, and attacked him with sticks, causing injuries, which resulted in his death within eight hours. The evidence showed that there existed a bitter hatred between the prisoners and the deceased, and pointed to a

* Confirmation Case No. 10 of 1877.

1877. quarrel which had taken place in the morning of the day on which
 the deceased was attacked.
 REG. *Incurity*, instructed by Maach hah Jehangir-shah, was heard
 " on behalf of the convicts. He urged that the evidence was dis-
 BALÁPÁ BIN crepant and untrustworthy, especially as regarded the share of
 DUNDAPÁ, Apana, No. 3, in the transaction.

Honourable F. N. Macph. Acting Government Pleader, for the Crown, urged that the evidence was sufficient for the conviction of all the three on the charge of murder.

MILYANT, J., delivered the judgment of the Court. After commenting at length on the evidence and observing that there was not sufficient evidence of the commission of any offence by prisoner No. 3, Apana, he proceeded thus :—

It seems impossible, therefore, to bring the acts of the prisoners within the definition of murder. What we consider to be proved is this, viz., that prisoners Nos. 1 and 2 went to the prostitute's house armed with sticks, intending to beat the deceased; and that prisoner No. 1 caused the death of the deceased by striking a blow which was likely to cause death but was not sufficient in the ordinary course of nature to cause death. Under these circumstances, prisoner No. 1 was guilty of the offence of culpable homicide not amounting to murder, and having regard to the provisions of section 111 of the Indian Penal Code, we consider that prisoner No. 2 was equally guilty of that offence.

Unfortunately this Court as a Court of reference does not appear to have power under section 283 of the Code of Criminal Procedure to alter a conviction of murder into one of culpable homicide not amounting to murder, but only to order a new trial. In referred cases there is generally a petition of appeal, and then this Court being a Court of Appeal as well as of reference can alter the finding of the Sessions Court (section 280); but in the present case there is no petition of appeal. We think that it is to be regretted that the Legislature should have taken no notice of the objections which were raised to section 399 of the old Code, and should have enacted section 288 in the same form. It seems quite useless to order a new trial merely because this Court considers that the facts established by the evidence constitute the

law, when there is an appeal as well as a reference, is there any apparent reason why it should not have the same power when there is a reference only. However, we have no choice but to obey the provisions of the law, which require us to annul the conviction and order a new trial. Fortunately, however, in the present case, the prisoners were arraigned on the charge of culpable homicide as well as on that of murder, and the trial on both charges was so far completed that the opinion of the assessors was taken on both charges, though the Session Judge only recorded a finding on the charge of murder. We think that we shall be sufficiently fulfilling the requirements of the law if, instead of ordering a new trial *ab initio*, we direct the Session Judge to complete the trial of accused Nos. 1 and 2 by recording a finding on the second charge, viz., that under section 304 of the Indian Penal Code, and in the event of his convicting the accused (as it may be presumed that he will do, though this Court has no authority to direct him to do so), we would suggest to him that he might appropriately sentence the accused No. 1 Balápá to rigorous imprisonment for five years, and accused No. 2 Máhádeváppá to rigorous imprisonment for three years.

1877.
 REG.
 v.
 BALÁPÁ BIN
 DUNDAPÁ.

Proceedings returned.

[APPELLATE CIVIL JURISDICTION.]

Before Sir M. R. Westropp, Kt., Chief Justice, and Mr. Justice Nándabhdí Haridds.

BHAGVAN DULLABH (ORIGINAL PLAINTIFF, SPECIAL APPELLANT) v.
 KALÁ SHANKAR (ORIGINAL DEFENDANT, SPECIAL RESPONDENT).*

April 26.

Hindu Law—Will—Nuncupative will.

A nuncupative will, or a verbal bequest, of his separate property, made by a separated Hindu, beyond the limits of the ordinary original jurisdiction of the High Court of Bombay, and not relating to any immoveable property to which the Hindu Wills' Act (XXI. of 1870) applies, is valid.

* Special Appeal No. 20 of 1875.

1877.

BHAGVAN
DULLABH
v.
KALÁ SHANKAR

THIS was a special appeal from the decision of H. J. Parsons, Assistant Judge of the District of Surat, confirming the decree of the 2nd Class Subordinate Judge of Bulsar, rejecting the plaintiff's claim.

The plaintiff, as heir of his divided brother, sued to recover certain immoveable property in the hands of his sister's son. The defendant answered that he had always lived with the deceased, and been treated by him as his son, and that before his death deceased had made a verbal bequest of the property in dispute to the defendant. The property was situated and the bequest made beyond the limits of the town of Bombay.

Shreshankar Govindrám, for the appellant, contended that there having been no formal adoption of the defendant he could not claim the property as against the brother and next heir of the deceased. He must, therefore, fall back on the nuncupative bequest; but this was invalid, because, in the first place, a Hindu could not leave the whole of his property away from his right heir, and in the next place, supposing he could, it must be by testamentary writing, not verbal bequest.

Nagindás Tulsiddás, for the respondent, contended that the brothers being divided, either of them might dispose of the whole of his separate property by will in whatever manner he pleased.

There is nothing in the Hindu Law to render void a nuncupative bequest, and the provisions of the Hindu Wills' Act do not apply to the case.

The following judgment was delivered by

NANABHAI HARIDAS, J.:—The plaintiff Bhagvan Dullabh brought this suit to recover certain immoveable property belonging to his deceased brother, Ranchhod.

The defendant, Kalá Shankar, who is his sister's son, alleged in his written statement that the plaintiff and the deceased Ranchhod were divided in estate; that from his childhood he had lived with his deceased uncle as his son; and that the deceased had made him owner of his estate. He accordingly contended that the plaintiff was not entitled to recover from him the property

It is not alleged that there is any nearer relative of the deceased than the plaintiff. The question, therefore, simply is which of the two is entitled to the property in preference to the other. It is found that the plaintiff and the deceased were divided in estate; and it is also found that the defendant "from his childhood always lived with the deceased, and seems always to have been treated and recognized and acknowledged by him and even by others as his son." Such recognition and acknowledgment, however, would not give the defendant the legal *status* of a son in the absence of any formal adoption: and it is found that none such took place. The plaintiff, therefore, although divided from the deceased, would, according to Hindu Law, be entitled to the property in dispute, if the defendant had merely to rely upon his relationship to the deceased and upon the fact of his having from his childhood lived with the deceased and been recognized by him as his son. But the defendant rests his claim also upon a title created in his favour by the deceased,—a verbal bequest. The fact of such bequest, "in pursuance of intentions previously expressed," is clearly found by the Assistant Judge. We have, therefore, to determine whether the title to the property has thereby passed to the defendant or not. It is, indeed, urged for the appellant that it has not, on the ground that the deceased had no power to make any such disposition of his property. But we think the power of a Hindu to make a testamentary disposition of whatever is his absolute property is now clearly established: see *Narottam Jagjwan v. Narsandas Harikisandas*; (1) *Mulras Lachma v. Chalkany Venkata Ramu Jagganadha Row*; (2) *Nagabutchmee Ummal v. Gopoo Nanduraja Chetty*; (3) and *Bapoo Beer Pertab Sahee v. Maharaja Rajender Pertab Sahee*. (4) In the last case their Lordships of the Privy Council observe (5):—"It is too late to contend that, because the ancient Hindu treatises make no mention of wills, a Hindu cannot make a testamentary disposition of his property. Decided cases, too numerous to be now questioned, have determined that the testamentary power exists, and may be exercised, at least, within the limits which the law

1877. *

BHAGVAN
DULLABHv.
KALÁ SHAN-
KAR.

(1) 3 Bom. H. C. Rep. 6, A. C. J.

(2) 2 Moore I. A. 54

(3) 6 Moore I. A. 309.

(4) 12 Moore I. A. 1.

Page 37.

1877. prescribes to alienation by gift *inter vivos*." That the plaintiff and the deceased Ranchhod were separate in estate is, as above observed, clearly found by the Lower Court. The latter, therefore, might have made a valid gift *inter vivos* of the whole of the property in dispute. Hence, it follows that it was equally competent to him to bequeath that property by will, as he has done in this case. But it is further urged that the will here was merely a nuncupative will. We cannot see how that circumstance could affect the validity of the will, if it were in fact made. Not a single authority is cited to us to show that a nuncupative will by a Hindu is invalid; and there are authorities the other way: see *Crinivasammal v. Vyayammal*; (1) *Tarachand Bose v. Nobeen Chunder Mitter*; (2) *Sudanund Mohapattur v. Soorjo Monee Debee*; (3) *Vinayak v. Govindrao* (4)

The will in this case was made in 1871, after "The Hindu Wills' Act, 1870," came into force; but as it was made beyond the limits of the ordinary original jurisdiction of this Court, and does not relate to any immoveable property situated within them, the provisions of that Act in no way apply to it.

We must, therefore, confirm the decree of the Lower Court, rejecting the claim with costs.

It was stated to us that the plaintiff himself was present at the time his brother Ranchhod made the verbal bequest in favour of the defendant, and actually consented to it; and it was accordingly contended that, he having thus allowed his brother to die in the belief that he had made a good bequest in favour of the defendant, it was not competent to the plaintiff now to question that bequest. But in the view we have taken of the case it becomes unnecessary for us to express any opinion on that point

Decree affirmed.

(1) 2 Mad. H. C. Rep 37.

(2) 3 Calc. W. R. 138, Civ. Rul.

(3) 8 Calc. W. R. 455, Civ. Rul

(4) 6 Bom. H. C. Rep. 224, A. C. J.

GENERAL INDEX.

ABANDONMENT OF MIRAS RIGHTS—*See* MIRAS, 1, 2, and ACT (BOMBAY) I of 1865, Sec. 2.

ABETMENT—

The offence of abetment under the Indian Penal Code is a substantive offence. The conviction of an abettor is, therefore, in no way dependent on the conviction of the principal. *Reg. v Maruti Dada*. 15

ABETTOR—*See* ABETMENT

ACCOMPLICE—*See* EVIDENCE, 3.

ACCOUNT—

The decree of the Court of first instance directed the Commissioner to take an account of the moneys paid by the plaintiff, during the period between 24th January 1865 and the date of the filing of the plaint, for the use and at the request of the defendants, and to allow credit to the defendants for the sums for which the plaintiff had given credit in his particulars of demand, and for all other sums for which the defendants should prove themselves entitled to credit, wherever the same might have become payable. The defendants, in their surcharge to the plaintiff's account, claimed credit for various payments made by them to the plaintiff between 25th January 1865 and 5th July 1865. The plaintiff claimed to appropriate these payments in satisfaction of his claim against the defendants

prior to 24th January 1865. The Commissioner, by his construction of the terms of the decree, held the plaintiff entitled to make such appropriation. The Judge, in the Court of first instance, explained his decree to mean that the whole account, prior to 24th January 1865, was wiped out, and directed the Commissioner that the plaintiff was not entitled to make the appropriation he claimed.

Held that the construction put by the Commissioner on the decree was right. *Huji Jina v Naran Mulji* 3

See HINDU LAW, 8.

ACCOUNT BOOKS—

Account books containing entries not made by, nor at the dictation of, a person who had a personal knowledge of the truth of the facts stated, if regularly kept in the ordinary course of business, are admissible as evidence under Section 34 of the Indian Evidence Act I of 1872, and *semble* under Sec. 32, Cl. 2.

Account books, though proved not to have been regularly kept in the ordinary course of business, but proved to have been kept on behalf of a firm of contractors by its servant or agent appointed for that purpose, are relevant as admissions against the firm. *Reg. v. Hamanta* 610

See ACT X of 1872, Sec. 452.

ACCOUNT, CREDIT IN.—*See* HUND.

ACCOUNT, ERROR IN.—*See* BOND

ACCOUNTS—

In moving to discharge or vary the report of the Commissioner for taking accounts, the right practice is to move on a memorandum of objections filed in the Prothonotary's office, and upon the evidence taken by, and the proceedings before, the Commissioner, and not on affidavits made for the purpose of the motion. In such a motion, affidavits should only be filed (a) when ordered by the Court, if it desire fresh evidence; or (b) by special leave of the Court for the purpose of advancing a fact which does not appear on the face of the proceedings before the Commissioner.

A note of the judgment of the Court, taken by a Deputy Registrar, cannot be consulted for the purpose of explaining or aiding in the construction of a decree.

Where, therefore, a decree was, on the face of it, an ordinary decree in a partnership suit, for the taking of the accounts between the partners in the usual way, the Court refused to allow the respondent to show, by reference to such a note, that what the decree meant was that he was to be credited and his partners debited with certain payments *in toto*, and not with their respective shares only. *Sumar Ahmed v Haji Ismail Haji Habib* 158

ACKNOWLEDGMENT.—*See* ACT IX of 1871, Sec. 20.

ACKNOWLEDGMENT OF RECEIPT OF CONSIDERATION.—*See* ACT VII of 1871.

ACKNOWLEDGMENT OF SIGNATURE BY TESTATOR.—*See* ACT X of 1865, Sec. 50, Cl. 3.

ACQUISITION OF GAIN.—*See* ACT X of 1865, Sec. 4.

ACQUITTAL—

The acquittal of the principal is no bar to the conviction of the abettor.

Raja Narayan Prasad 16

ACTION, CAUSE OF.—*See* JURISDICTION, 1.

ACTION FOR DAMAGES CAUSED BY A CIVIL ACTION.—*See* DAMAGES.

ACTS DONE IN OFFICIAL CAPACITY.—*See* ACT X, of 1872, Sec. 209, JURISDICTION, 3

ACTS—

XVI of 1838, Sec. 1, Cl. 2.—The power reserved to the Revenue Courts by Section 1, Clause 2 of Act XVI of 1838, to determine the facts of possession and dispossession was so reserved merely for the temporary purpose of enabling those Courts to dispose of the immediate possession, which was to continue until the Civil Court ejected the party put into such immediate possession. The purpose of Act XVI of 1838, as that of Bombay Act V of 1864, was temporary only, and chiefly to provide for the cultivation of the land and to prevent breaches of the peace until the Civil Court should determine the rights of the disputants. The decisions of the Revenue and Mamlatdars' Courts as to possession and dispossession, do not bind the Civil Courts, the proceedings in the former Courts being of a summary character. The Civil Courts alone can entertain the question of title. *Basappa bin Murtappa v. Lakshmapa bin Marutamapa* 624

See REVENUE COURTS.

XI of 1843.—*See* ACT XXIII of 1871, Secs. 3, 4, and 6. ADOPTION.

XIX of 1843.—*See* REGISTRATION.

IX of 1850, Sec. 78—

Quare—Whether a Court executing the decree of a Small Cause Court under Sec. 78 of Act IX of 1850 could enforce it against immovable property. *In re Jagjwan Nandhan* 82

See DECREE OF SMALL CAUSE COURT.

XXI of 1850—Since Act XXI of 1850 came into force, mere loss of caste does not occasion a forfeiture of rights or property.

A Hindu widow entitled to a bare or starving maintenance, under a decree made in a suit, brought by her for maintenance against the representatives of her deceased husband, is not to be deprived of the benefit of that decree by the fact that she has, since its date, been leading an incontinent life.

Rajah Pirthee Singh v. Rancee Ráj Kower (20 Calc. W. R., 21 Civ. Rul.) distinguished *Honamā v. Timannabhat* 559

XXVI of 1850.—See JURISDICTION, 3.
XVIII of 1854, Sec. 17. See RAILWAY COMPANY.

VIII of 1859, Sec. 2.—A previous suit in which the plaintiff elected to use the defendants as principals, bars a second suit on the same contract in which the defendants are charged as responsible agents under a trade usage. *Devráv Krishna v. Hálambháí* . . . 78

SECS. 5 and 26.—See ACT XIV of 1869, Sec. 24, Cl. 2.

SEC. 15.—See SUIT TO SET ASIDE ADOPTION.

SEC. 30.—When the Appellate Court decides that the Lower Court had no jurisdiction to entertain the suit, it should return the plaint to the plaintiff in order that it may be presented to the proper court.

Bái Máhkor v. Bulákhí Chaku, 538
and *Kálu v. Váshráv* . . . 343
See ACT XIV of 1869, Sec. 24.

SEC. 119.—The Court of first instance refused to receive the defendant's written statement, because it had been tendered after the day on which the Court had ordered it to be filed, and the delay had not been satisfactorily explained. The Court however, framed the issues in the presence of the defendant's pleader, who was also allowed to cross-examine the plaintiff's witnesses. The Court made a decree in favour of the plaintiff. In appeal, the District Judge held that the decree of the first Court was *ex parte*, under Sec. 119 of the Civil Procedure Code, and that, therefore, no appeal lay,

Held by the High Court in special appeal that the decree of the first Court was not *ex parte* under the circumstances. *Raghápd bin Hanmápd v. Párápd bin Shívápd* . 7

SEC. 123.—Sec. 123 of the Civil Procedure Code contemplates that a defendant shall, in his written statement, set forth the case he intends to make at the trial. *Chová Kará v. Isá bin Khalfá* . . . 209
See PRACTICE, 6.

SEC. 290.—*Seemle* that a decree for restitution of conjugal rights between Muhammadans or Hindus may be enforced under Sec. 200 of Act VIII of 1859. *Yamunábái v. Náráyán Moreshvar Pendse* . 164

See HUSBAND AND WIFE.

SEC. 206.—See ACT IX of 1871 Sched. 11, Cl. 85.

SEC. 287.—Although the Court of Small Causes at Bombay has power to enforce its decrees against moveable property only, yet, if that decree be transmitted to a Court to which the Code of Civil Procedure applies, the latter can, under Sec. 287 of that Code, enforce it against immoveable property also. *In re Jagjwan Nánábhái* 32

SEC. 309.—See COURT FEES.

SEC. 348.—A pauper respondent is not entitled to present objections at the trial of an appeal without payment of stamp duty. *Bábá Hari v. Rájáráv Báldál* . . . 75

SEC. 376.—See ACT XIV of 1869, Sec. 24, Cl. 2.

XIV of 1859, Sec. 1, Cl. 10.—A promissory note, dated 2nd April 1868, stipulated that the principal amount with interest was to be repaid by half-yearly instalments of Rs. 150 each, and that, in the event of any one of these instalments not being punctually paid, the whole amount was to become payable at once. Default was made in payment of the first instalment, which fell due on 2nd October 1868. In an action brought on 19th October 1871 for the recovery of the whole amount,

Held that the right to bring the suit under Act XIV of 1859, Sec. 1., Cl. 10, accrued to the plaintiff on 2nd October 1868, and that, having omitted to bring it for more than three years, he was too late in instituting it on the 19th October 1871.

Held, also that the plaintiff's right to the immediate payment of the whole amount was not, under the note, subject to be defeated by any subsequent payment, and that no such subsequent payment (assuming it to have been made) could, in the absence of any fresh agreement, supersede or suspend such right.

The proposition laid down in *Rāmkrishna Mahādev v. Bayājī Santāji*, (5 Bom. H. C. Rep. 35, A. C. J.) that, "although the instalments were not paid by the defendants at the times fixed for payment, yet the defendants having paid the money on account of them, and the plaintiff having accepted it, the payments must be considered, as regards both parties, as if made at the times fixed; and the plaintiff cannot take advantage of the stipulation that the sum should become due on failure to pay any instalment or the defendants rely upon it as making the whole debt due, and fixing the period from which the time of limitation ran," overruled, as there is nothing in Act XIV of 1859 to give any such effect to an acceptance of part payment after the whole debt has become due. *Gumnd Dambarshet v. Bhiku Haribā* . . . 125
See LIMITATION, 1, 2, 3. SUIT TO ASIDE ADOPTION.

XXXI of 1860, Sec. 32, Cl. 6—

Under Act XXXI of 1860, Sec. 32, Cl. 6, a sentence of fine only, or of imprisonment only, is a legal sentence.

A penal statute should, when its meaning is doubtful, be construed in the manner most favourable to the liberties of the subject, and this is more especially so when the penal enactment is of an exceptional character. *Reg. v. Bhusā*

XIV of 1860, Sec. 214.—Whenever the words, "voluntarily," "intentionally," "fraudulently," "dishonestly," or others whose definition involves a particular intention, enter along with a specified act into the description of an offence, the offence not being one irrespective of the intention, is not one which the exception to Sec. 214 of the Indian Penal Code by itself allows to be compounded.

Reg. v. Rahimat . . . 147

See COMPOUNDING OF OFFENCES 1, 2.

SEC. 291.—See ACT X of 1872, Sec. 473.

SEC. 378.—See ACT X of 1872, Sec. 52.

SEC. 380.—See SENTENCE, 1.

SEC. 457.—See SENTENCE, 1.

SEC. 494.—Courts of law will not recognize the authority of a caste to declare a marriage void, or to give permission to a woman to remarry.

Bona fide belief that the consent of the caste made the second marriage valid, does not constitute a defence to a charge, under Section 494 of the Indian Penal Code, of marrying again during the life-time of the first husband, or to a charge of abetment of that offence under that section combined with Section 109. *Reg. v. Sambhu Rāghu* . . . 347

XI. of 1864.—See KAZI.

XX of 1864, Secs. 11 and 15.—Sections 11 and 15 of Act XX of 1864, taken together, show that a Collector, when appointed to take charge of the estate of a minor, is so appointed in his capacity as Collector, and, therefore, as an officer of Government within the meaning of Act XIV of 1869, Sec. 32. *Narsingrāo Rāmdachandra v. Laxumanrāo* . . . 318

X of 1865, Sec. 50, Cl. 3.—It is a sufficient acknowledgement by a testator of his signature to his will if he makes the attesting witnesses understand that the paper which they attest is his will, though they

any signature to the paper which they attest, provided that the Court is satisfied that the testator's signature was on the will when the witnesses attested it. *Mánickbai v. Hormasji Bomanji* 547

XXI of 1865.—It is not a condition precedent to the application of Section 5 of Act XXI of 1865 that the predeceased son of an intestate Pársi should have left a widow and issue.

Where an intestate Pársi left him surviving a widow, sons, daughters, children of a predeceased son, and the widow of another predeceased son, who had died without issue and a posthumous daughter was afterwards born to the intestate,

Held that such last-mentioned widow was entitled to one moiety of the share in the intestate's estate which her husband would have taken had he survived the intestate, and that the other moiety of such share devolved on the surviving issue of the intestate, including the posthumous daughter, and the children of his other predeceased son *Mancheryi Kowasji Davur v. Mithi bai* . . . 506

X of 1866.—*See* COMPANY.

SEC. 4.—An association of artizans for the purpose of enhancing the price of their work by bringing all the business of their trade into one shop and dividing the prices of the work done amongst the members according to their skill, is an association that has for its object the acquisition of gain, and if consisting of more than twenty persons must be registered.

Where more than twenty artizans signed an agreement, whereby they constituted themselves an association for the above purpose, but which association was not registered as a company under Act X of 1866,

Held that the Court could not grant an injunction to restrain the breach of such agreement. *Bhikaji Sabaji v. Bapu Saju* 559

XX of 1866.—Sec. 17 of Act XX of 1866 extends to a deed of partition, and this is not prevented by such an instrument being enumerated in Sec. 18, amongst

those which are optionally registrable. *Shankar Ramchandra v. Vishnu Anant* 67

SEC. 17, Cls. 2 and 3.—A document purporting to have been passed by a mortgagee to his mortgagor, and reciting the demand of the former for repayment of his mortgage money before the date of the mortgage, and the compliance with that demand by the latter by means of a fresh loan upon a second mortgage of the same property; and reciting also the fact of the delivery of possession of the property by the original to the second mortgagee; and purporting, in conclusion, to contain a declaration by the original mortgagee that nothing remained due to him in respect of his mortgage, is a document which, under Cls. 2 and 3 of Sec. 17 of Act XX of 1866, as well as under Cls. 2 and 3 of Sec. 17 of Act VIII of 1871, requires registration, and if, unregistered, is, by Section 49 of the same two Acts, inadmissible as evidence of any transaction affecting any property comprised therein.

The fact of the extension of the original mortgagee's lien may, however, be proved by other documentary or proper oral evidence. *Madadaji v. Vyankaji Govind* . . . 197

SEC. 18.—The enumeration in Section 18 of Act XX of 1866, of a deed of partition amongst those optionally registrable, does not prevent its registration being compulsory under Section 17. *Shankar Ramchandra v. Vishnu Anant* 67

SEC. 50.—*See* REGISTRATION.

XIV of 1869, Sec. 24.—A Subordinate Judge of the 2nd class has no jurisdiction to entertain a suit for the declaration of the plaintiff's title where the property in respect of which the declaration is sought exceeds Rs. 5,000 in value.

The law may lay down, for purposes of revenue, certain rules for the valuation of suits; but such valuation cannot be accepted as a criterion of the actual amount or value of the claim, upon which the jurisdiction of a Court depends.

Whether a suit be merely to obtain a decree, declaratory of the plaintiff's title to, or whether it be to establish his title, coupled with a prayer for possession of, the rights of a deceased person, the inheritance is the object in dispute,

The actual value of the estate, to which the plaintiff claims to be entitled, and not the value which it may eventually represent to the plaintiff, is the value of the subject-matter.

Where the Appellate Court decides that the Lower Court had no jurisdiction to entertain the suit, it should return the plaint to the plaintiff, in order that it may be presented to the proper court. *Bai Mahkor v. Bulakhi Choku* . 538

CLAUSE 2.—For the purpose of determining the question of jurisdiction, the valuation of a suit should be computed according to the market value of the subject-matter of the suit, and not according to the special rules applicable to valuation fixed in Act VII of 1870.

Namhoon Singh v. Tofanee Singh (12 *Beg. L. R.* 113), *Jebraj Singh v. Inderjeet Maktoon* (*Ibid.* 115, *Note* 1), and *Bai Mahkor v. Bulakhi Chaku* (*L. L. R.* 1 *Bom.* 538) followed.

PINNEY, J.—A view may be admitted on any ground, whether urged at the original hearing at the appeal or not, whenever the Court considers that it is necessary to correct an evident error or omission, or is otherwise requisite for the ends of justice, following *Chintamani Pal v. Pyari Mohun Mukerjee* (6 *Beng. L. R.* 126) *Kalu bin Bihradji v. Vishram Mawdgi* . 543

SEC. 32.—See JURISDICTION, 3 ACT XX of 1864, Secs. 11 and 15.

VII of 1870, Secs. 5 and 7.—The meaning of Clause VIII, Section 7 of the Court Fees Act VII of 1870 is that a person suing to set aside an attachment on land shall, in no case, be called upon to pay a higher fee than he would have to pay if he were suing for possession of the land.

Accordingly in a suit for setting aside a summary attachment, under Bombay Act I, of 1865, placed by the Collector on land held on a settlement for a period not exceeding thirty years, the value was held to be five times the assessment, and the stamp duty calculated upon it irrespective of the actual market value, or the amount for which the land was attached. *The Collector of thána v. Daddabhai Bomanyi*. 352

See ACT (Bom.) I of 1865, Sec. 35.

SEC. 4, Sched. II., Art. 17, Cls. 3 and 6, and 1 and 3.—See ACT XIV of 1869, Sec. 24, Cl. 2.

SEC. 16.—A pauper respondent is not entitled to present objections at the trial of an appeal without payment of stamp duty. *Babaji Huri v. Ruyaram Ballal* . 75

SCHED. I., Cl. 11.—For the purpose of determining the probate fee in respect of an annuity, the word "value" in the Court Fees Act VII of 1870, Sched. I., Cl. 11, must be taken to mean the market value of the annuity, and not ten times the amount of a yearly payment.

Where the property, in respect of which probate is sought, is mortgaged, the amount of the mortgage incumbrance must be deducted from the market value of the property, and the probate fee charged on the balance. *In re Will of Ramchandra Lakshmanji* . 118

SCHED. II, Art. 17, Cl. 5.—See SUIT TO SET ASIDE ADOPTION.

VIII of 1871, Sec. 17.—Where a mortgagee obtained a decree against his mortgagors for the payment of the mortgage moneys, and in default for the sale of the mortgaged property, and his heirs afterwards executed an assignment of the decree for valuable consideration to the plaintiff, who proceeded to execute the decree by sale of the mortgaged property.

Held that the assignment was a document of which the registration was compulsory. *Gopal Narayan v. Trimbak Sadashiv* . 267

SEC. 17, Cls. 2 and 3, and Sec. 18, Cl. 7.—J. T. passed a writing to V., under date 28th April 1874, stipulating that the deed of sale of J. T.'s bungalow to V for Rs. 4 300, which was to have been made that day, owing to certain circumstances therein mentioned, should be made and delivered by J. T. to V. 20 days thereafter. The writing further acknowledged the receipt, by J. T. from V., of Rs. 100 as earnest money for the purchase of the bungalow, and concluded with certain penalties in the event of a default by either party. In a suit in the nature of a suit for a specific performance brought by V. to compel J. T. to execute the deed of sale to V., and to register the same as promised in the writing of 28th April 1874,

Held that the writing required registration under Act VIII of 1871, Sec. 17, Cls. 2 and 3, as it distinctly acknowledged the receipt of Rs. 100 as part of the consideration for the sale of the houses to the plaintiff for the sum of Rs. 4,300, and operated to create an interest in the house of the value of Rs. 100 and upwards.

Mahad v. Dari (I. L. R. 1 Bom. 196) approved and followed.

Jusab Haji Jafar v. Haji Gul Muhammad (12 Bom. H. C. Rep. 175); *Hargovandas v. Balkrishna* (7 Bom. H. C. Rep. 67, O. C. J.); and *Kedarnath Dutt v. Shamlal Khettry* (11 Beg. L. R. 405) distinguished *Valaji Isaji v. Thomas* . . . 190

SEC. 17, Cls. 2. and 3.—A document purporting to have been passed by a mortgagee to his mortgagor, and reciting the demand of the former for re-payment of his mortgage money before the due date of the mortgage, and the compliance with that demand by the latter by means of a fresh loan upon a second mortgage of the same property; and reciting also the fact of the delivery of possession of the property by the original to the second mortgagee; and purporting, in conclusion, to contain a declaration by the original mortgagee that nothing remained due to him in respect of his

mortgage, is a document which, under Cls. 2 and 3 of Sec. 17 of As. XX of 1866, as well as under Cls. 2 and 3 of Sec. 17 of Act VIII of 1871, requires registration, and, if unregistered, is, by Sec. 49 of the same two Acts, inadmissible as evidence of any transaction affecting any property comprised therein.

The fact of the extinction of the original mortgagee's lien may, however, be approved by other documentary or proper oral evidence. *Mahadaji v. Vyankaji Govind* . . . 197

IX of 1871.—See LIMITATION.

SEC. 20.—The "promise" referred to in Section 20 of Act IX, of 1871, is a promise introduced by way of exception, in a suit founded on the original cause of action and not a promising constituting a new contract, and extinguishing the original cause of action. Accordingly a suit is not barred which is brought on a bond executed, in consideration of a barred debt, after the expiration of the period prescribed for its recovery. *Raghaji Bhikaji v. Abdul Karim* . . . 590

SCHED. II., Cl. 72.—The holder of a promissory note, payable on demand, dated 14th April 1870, demanded payment on 8th December 1872. The maker than paid interest in advance up to 1st April 1873, upon the condition that the holder should make no demand until that date.

Held that this transaction amounted to the substitution of a new contract for that contained in the promissory note; that the period of limitation must be reckoned from 1st April 1873; and that, consequently, a suit to recover the balance due on the note, instituted on 27th March 1876, was not barred. *Nata Hira v. Janardan Ramachandra* . . . 503

CL. 85.—An application (under Rule 149 of the Common Law Rules of the Supreme Court of Bombay) by an attorney, that his client should show cause why he should not pay the balance shown by the Taxing Master's *allocature* to be due in respect of his bill of costs, and why, in default of such payment, attachment should be

issue against the person and property of the client, is not a "suit" within the meaning of the Limitation Act IX of 1871.

Such an application as the above is not barred by any law of limitation now in force in British India. *Abbā Hājī Ishmā'il v. Abbā Thara* 253

A solicitor was retained in July 1871 to execute a decree. In November 1871 a prohibitory order was made in the cause, after which the solicitor did nothing more in the matter. In June 1872 the decree-holder and judgment-debtor settled the matters in dispute between them without the knowledge of the solicitor; but this compromise was not made through, or certified to, the court which passed the decree. In a suit brought in December 1875 by the solicitor against the decree-holder to recover the amount of his bill of costs,

Held that the plaintiff's claim was not barred by Art. 85 of Sched. II to Act IX of 1871. *Hearn v. Bāpu Saju Nāikin* 505

CL. 129.—*See* SUIT TO SET ASIDE ADOPTION.

CLs. 166, 167.—A, as purchaser of a decree against B, applied for execution thereof, and having caused five fields of B to be sold in execution, purchased four of them at the court sale, and one from an execution purchaser. On 10th July 1871, however, the High Court in a Misc. Sp. App. by B, held A's application for execution to have been time-barred, and reversed the orders of the two lower courts. A having been put in possession of the fields under the orders of the Lower Courts, B, on a reversal of those orders by the High Court, applied, on 9th July 1874, to have the field restored to him, together with the mesne profits accruing during the time of his dispossession. The first court awarded the fields to B with mesne profits, but the District Judge, on appeal, held B's application barred under Act IX of 1871, Sched. II.

Held by the High Court that the exception in Cl. 166 of Sched. II of the Limitation Act IX of 1871 is not restricted to any particular species of appeal, that B's application fell within Cl. 167 and not within Cl. 166, and therefore, was not barred. *Umāshankar Lakshmīrām v. Chotā'lāl Vajerām* 19

SEC 29 and Sched. II, Cl. 130.—*See* ACT (Bom.) VI of 1862.

XXIII of 1871.—*Toda gras haks* are within the scope of the Pensions Act XXIII of 1871; and a suit in respect of them cannot be instituted without the certificate required by Sec. 6 of the Act.

Where a mortgagee of such *haks* had, before the date on which the Act came into operation, obtained a decree for the recovery of his mortgage debt from the mortgaged *haks* and from the mortgagor personally, and a fresh suit was necessary to enforce execution of that decree against these *haks*,

Held that the Act did not apply to such fresh suit.

Semble that the word "right" in Sec. 3 of Act XXIII of 1871 is equivalent to the word *hak* in its restricted sense of "allowance" or "fee." *Parbhudas Rayaji v. Motirām Kalyāndās* 203

SEC. 4 of the Pensions Act XXIII of 1871 debars the Civil Court from taking cognizance of any suit, whether the Government is a party to it or not, which relates to any pension or grant of money or land-revenue conferred or made by the British or any former Government without a certificate from the Collector or other authorized officer. Section 5 prescribes a remedy for the claimant of such pension or grant, and Section 6 enables the revenue officer to refer the parties to the Civil Court for the determination of their respective interests in the income or other benefits, which the executive will, however, still, as against either or both of the litigants, be at liberty to allow or

Lands held free of assessment under a grant from Government, which bestows on the grantee the lands themselves and not merely the Government revenue arising from them, do not fall within the provision of the Pensions Act. *Bābāji Hari v. Rājārām Ballāl* . . . 75

SECS. 3, 4, and 6.—Though, as stated in *Krishnarāv v. Rangrāv* (4 Bom. H. C. Rep. 1, A. C. J.), “*sanadi* grants in *inām*, *saranjām*, &c, are, generally speaking, more properly described as alienations of the royal share in the produce of the land (i. e., of land-revenue), than grants of land, although in popular parlance occasionally so called,” yet such is not invariably the case.

If words are employed in a grant which expressly, or by necessary implication, indicate that Government intends that, so far as it may have any ownership in the soil, that ownership shall pass to the grantee, neither Government nor any person subsequently to the date of the grant deriving under Government, can be permitted to say that the ownership did not so pass, unless there are in the grant such detailed provisions as show that such words are limited in their operation.

An enactment of a character so arbitrary as Act XXIII of 1871 ought to be construed strictly, and the Court should not extend its operation further than the language of the Legislature requires.

The meaning of the expression “grant of money or land-revenue,” extended by Section 3 of Act XXIII of 1871, to include “anything payable on the part of Government in respect of any right, privilege, perquisite, or office,” is not of so wide a range as to include a grant of the proprietorship of the soil, or any suit involving the rights of a proprietor of the soil. *Krishnarāv v. Rangrāv* (4 Bom. H. C. Rep. 1, A. C. J.); *Vaman Janarāhan v. Collector of Thāna* (6 Bom. H. C. Rep. 191, A. C. J.); and *Ruttonji Edulji v. Collector of Thāna* (11 Moore I. A. 295), distinguished.

B580—b

A *sanad* by the State purporting to grant a village in *inām*, “including the waters, the trees, the stones and quarries, the mines, and the hidden treasures, but excluding the *Hakdārs* and *Ināmdārs*.”

Held to be a grant by the State of such proprietary right as it had in the soil of the village to the grantee.

It is not open to the grantor to say that such words as the above mean nothing but land-revenue.

The saving of the rights of the *Hakdārs* and *Ināmdārs* does not prevent the property in the soil, so far as it can be regarded as vested in Government, from passing to the grantee. *Rājaji Nārāyan Mandlik v. Daddaji Bāpaji, Māmlatdār of Ratnāgiri* . . . 523

A suit for a declaration of the plaintiffs eligibility to officiate as *patil* of a village is not prohibited by Act XXIII of 1871. That Act should receive a strict construction, as being in derogation of the right of the subject to resort to the ordinary Civil Courts. *Bābāji v. Rājārām* (I. L. R. 1 Bom. 75) distinguished. *Gurushidgavda bin Rudragavda v. Rudragavdati kom Dyamangavda* . . . 531

XXV. of 1871, Sec 2.—See RAILWAY COMPANY.

I of 1872, Sec. 92.—The defendant admitted the execution of a deed of sale, but alleged that contemporaneously with it he entered into an oral agreement with the vendee that the deed was to be merely a security for the payment of a certain sum of money by the defendant to the vendee, and that a large portion of the sum so secured had already been paid to the vendee.

Held in special appeal that as the alleged agreement was wholly inconsistent with the terms of the deed of sale, evidence to prove such agreement was excluded by Act. I of 1872, Sec. 92. *Muttyloll Seal v. Annundochunder Sandile* (5 Moore Ind. Ap. 72) distinguished. *Banāpā v. Sunārādās Jagivan-*

Sec. 113.—The Governor-General in Council being precluded by the Act 24 and 25 Vic., Chap 67, Section 22, from legislating directly as to the sovereignty or dominion of the Crown over any part of its territory in India, or as to the allegiance of British subjects, cannot by any legislative Act (*e.g.*) by the "Evidence Act I of 1872," Section 113), purporting to make a notification in the *Government Gazette* conclusive evidence of a cession of territory, exclude judicial enquiry as to the nature and lawfulness of that cession. *Damodhar Gordhan v. Devdām Kanji* 367
See CESSION OF TERRITORY.

IX of 1872, Sec. 25, Cl. 3.—See ACT IX of 1871, Sec. 20.

X of 1872, Sec. 18.—See ACT X of 1872, Sec. 314.

Sec. 67.—Where dacoity was committed at Velanpor, a village in the territory of H. H. the Gāyak-wād, and a part of the stolen property found where it had been concealed by the accused in British territory, it was

Held that a conviction of dacoity could not be sustained, that being a substantive offence completed as soon as perpetrated at Velanpor; although, had Velanpor been in British territory, the subsequent acts in the process of taking away the property might, in the legal sense, have coalesced with the first and principal one, so as to give jurisdiction under Sec. 67 of the Code of Criminal Procedure in each district into which the property was conveyed. But, on a conviction of retaining stolen property, the sentences awarded could, it was held, be sustained, the retaining having taken place in British territory. *Reg. v. Lakhyā Govind* . . . 50

Sec. 122.—A confession recorded under Sec. 122 of the Code of Criminal Procedure to be admissible in evidence must not only bear a memorandum that the Magistrate believed it to have been

voluntarily made, but also a certificate, under Sec. 346 of the Code, that it was taken in the Magistrate's presence and hearing, and contains accurately the whole of the statement made by the accused person. *Reg. v. Skirga* 219
See CONFESSION.

Sec. 157.—It is not essential to the validity of a warrant issued under Section 157 of Act X of 1872 that the Magistrate, issuing it, should be, at the time he issues it, within the local limits of his jurisdiction. He may issue such a warrant from a place in foreign territory. *Reg. v. Lochā Kāld* 340

Sec. 209.—A *kārkūn* on the establishment of a Civil Court, entrusted with the execution of a writ, reported to the Court that a particular person obstructed him in attaching property as commanded by the writ; and a report was thereupon made by the Court to a Magistrate with a view to proceedings being taken against the obstructor. The Magistrate acquitted the accused, and ordered the *kārkūn* to pay the accused compensation under Sec. 209 of the Criminal Procedure Code.

Held that such last-mentioned order was wrong, the *kārkūn* not being a complainant within the meaning of Sec. 209 of the Code of Criminal Procedure. In such a case as the above the Subordinate Judge should be regarded as the complainant, and he, having acted judicially, was not liable to the penalty provided in Sec. 209 of the Criminal Procedure Code. *In re Keshav Lakshman* 175

Sec. 210.—See COMPOUNDING OF OFFENCES.

Sec. 215.—A warrant case of a nature not compoundable under Sec. 214 of the Indian Penal Code was "dismissed" on the parties coming to an amicable settlement.

Held, that the "dismissal" was equivalent to a discharge under Sec. 215 of the Code of Criminal Procedure, and the composition did not affect the revival of the prosecution, if

that should otherwise be thought necessary or expedient. *Reg. v. Devdámá* 64

SEC. 220.—*See* SENTENCE.

SEC. 263.—*See* JURY.

SEC. 288.—Under Section 288 of the Code of Criminal Procedure, the High Court, to which a reference is made by a Court of Session for confirmation of a sentence of death on conviction of murder, cannot, in the absence of an appeal, alter the conviction to one of culpable homicide not amounting to murder, if it be of opinion that the evidence does not establish the former, but the latter offence. It must order a new trial for that purpose.

Where the prisoners were tried on two charges of murder and culpable homicide not amounting to murder, and the opinion of the assessors was taken on both charges, but the Sessions Judge being of opinion that the evidence established the former charge, recorded a conviction and sentence for murder only, the High Court being of opinion, on a reference under Section 287 of Act X of 1872, that the offence proved was culpable homicide not amounting to murder, did not order a new trial *ab initio*, but directed the Sessions Judge to complete the trial by recording a finding on the second charge of culpable homicide not amounting to murder. *Reg. v. Bálápábin Dándápá* . . 638

SEC. 296.—*See* PRACTICE, 2.

SEC. 314.—The aggregate of the sentences passed under Sec. 314 of the Code of Criminal Procedure in a case of simultaneous convictions for several offences, must be considered a single sentence for the purposes of confirmation or appeal. *Reg. v. Rámá Bhivgoudá* . . . 228
See SENTENCE.

SECS. 344, 345.—*See* ACT X of 1872, Sec. 52.

SEC. 346.—*See* CONFESSION.

SEC. 347.—

It is not competent to a Magistrate to convert an accused person into a

witness except when a pardon has been actually granted under Sec. 347 of the Code of Criminal Procedure. Evidence given by such a person who had received a pardon in the case of an offence not exclusively triable by the Court of Sessions, held not relevant, that person not having been acquitted or discharged, or convicted. *Reg. v. Hanmanta* 610

CHAPTER XXX.—*A* was charged before the police with theft of certain property. The police considered that no theft had been committed, and reported the matter to a 2nd Class Magistrate, who, agreeing with the police, ordered the property to be restored to *A*. On application by the complainant, the District Magistrate found that *A* had removed, though not dishonestly, the property from *B*, a deceased person; and ordered the property to be given by the police to *B*'s heirs. It was so given.

Held that the provisions of Chapter XXX of the Code of Criminal Procedure do not apply to such a case. Sections 415, 416, and 117 contemplate proceedings preliminary to and independent of, inquiry. Upon general principles, where there has been an inquiry or a trial, and the accused person is discharged or acquitted by any Criminal Court, that Court is bound to restore that property into the possession of the person from whom it is taken, unless, as provided for by Section 418, such Court is of opinion that "any offence appears to have been committed" regarding it, then such order as appears right for the disposal of the property may be made.

The High Court cannot direct the restoration of the property already delivered by the police under the illegal order of the District Magistrate. *In re Annapurnabai* . . . 630

SEC. 452.—The accused persons were tried on 27 charges, comprising the offences of theft, abetment of theft, and receiving stolen property, in 1872-73; similar offences in 1873-74, similar offences in 1874-75, the

giving and receiving of gratifications to and by public servants in 1874-75; and, finally, the fabrication and abetment of fabrication of false evidence in 1876. One of the accused was convicted on two heads of charge, and the rest acquitted. The convicted appealed against his conviction and sentence, and the Government appealed against his acquittal on the other heads as well as against the acquittal of the rest.

Held that the trial was irregular under Section 452 of the Code of Criminal Procedure; and so would be the hearing of the appeal. The High Court, however, heard the appeal in respect of offences in 1874-75 only, it appearing that this course did not prejudice the accused persons who had been fully and fairly tried for those offences.

Account books containing entries not made by, nor at the dictation, of a person who had a personal knowledge of the truth of the facts stated if regularly kept in course of business, are admissible as evidence under Section 34 of the Indian Evidence Act I of 1872, and *semble* under Sec. 32, Cl. 2.

Account books, though proved not to have been regularly kept in course of business, but proved to have been kept on behalf of a firm of contractors by its servant or agent appointed for that purpose, are relevant as admissions against the firm.

It is not competent to a Magistrate to convert an accused person into a witness, except when a pardon has been lawfully granted under Section 347 of the Code of Criminal Procedure. Evidence given by such a person who had received a pardon in the case of an offence not exclusively triable by the Court of Sessions, *held* not relevant, that person not having been acquitted or discharged, or convicted.

Seizure of wood by a forest inspector who is a servant of Government in possession of the Government itself and a dishonest removal of it without payment of the necessary fees from his possession, albeit with his actual consent, constitutes

theft, within the meaning of Sec. 378 of the Indian Penal Code, if that consent was unauthorized or fraudulent. *Reg. v. Hanumant* 610

SEC.—154.—*See* SENTENCE.

SEC. 473.—Giving false evidence is “an offence committed in contempt of the authority” of a Court within the meaning of Sec. 473 of Act X of 1872. *Reg. v. Navranbeg* (10 Bom. H. C. Rep. 73) and the ruling in 7 Mad. H. C. Rep., Appx. XVII, followed *Queen v. Kultaran Singh*, I. L. R., 1 All. 129 and *Queen v. Jagat Mull*, *Ibid.*, 162, dissented from.

Where the accused, was by a Magistrate, 1st Class, committed for trial by the Sessions Court on a charge of having given false evidence in a Judicial proceeding before the Sessions Judge, there being no Assistant Sessions Judge or Joint Sessions Judge,

Held that the committment could not be quashed, there being no error in law, and the case must, therefore, be transferred for trial to another Court of Sessions.

In such a case as the above the better course would be for the Magistrate to try the case himself, and, if he is incompetent to pass a sufficient sentence, for the Sessions Judge to refer the case to the High Court for enhancement of sentence. *Reg. v. Gaji kom Rattu* . . . 311

SEC. 473 of the Code of Criminal Procedure, which, except as therein provided, forbids a Court to try any person for an offence committed in contempt of its own authority, is not limited to offences falling under Chapter X of the Indian Penal Code, but extends to all contempts of Court.

Reg. v. Kultaran Singh (I. L. R. 1. All. 129) dissented from.

7 Mad. H. C. Rep., Ap. XVII approved.

Reg. v. Navranbeg Dulabeg (10 Bom. H. C. Rep. 73) followed. *Reg. v. Parsapa Mahadevapa* . . . 339

X of 1875, Secs. 32, 37.—A prisoner not being a European British subject, who is not charged jointly with a European British subject,

is not entitled, under the provisions of the High Court Criminal Procedure Act, to be tried by a jury of which, at least, five persons shall not be Europeans or Americans. *Reg. v. Lalubhāi Gopāldās* . . . 231

SEC. 33.—Act X of 1875 Section 33 contemplates that the names of the jury to be "chosen by lot" shall all be drawn out of one box containing the names of all persons summoned to act as jurors. *Reg. v. Vithaldās Prānjivandās* . . . 462

ACTS (Bombay)—

V of 1862.—There is nothing in Bombay Act V of 1862 which debars a Civil Court from making a decree for the partition of *Narvādāri* land, among the *Bhāgdārs*, even though such partition may cause a further division of recognized sub-divisions of *Bhāgs*. *Veribhāi v. Raghābhāi* . . . 225

(2).—The sale of a portion of a *bhāg* or share in a *Bhāgdāri* or *Narvādāri* village, other than a recognized sub-division of such *bhāg* or share, or of a building site appurtenant to it, is illegal under Section 3 of Bombay Act V of 1862. and a judgment-creditor cannot, in execution of his decree, evade the law by describing his debtor's separate portion in a *bhāg* as his "right, title, and interest in the whole *bhāg*;" for under Section 213 of the Code of Civil Procedure, the creditor is bound to specify the debtor's share or interest to the best of his belief, or so far as he has been able to ascertain the same.

Quære, if the sale of an undivided share in a *bhāg* be lawful; but even if it be, the purchaser cannot insist upon the possession of any particular portion of the *bhāg*, as representing the share of his debtor. All he can do is to sue for partition.

But *Quære*, if such partition could be made *Ardesir Nasarvānji v. Mase Nāthā Amiji* . . . 601

SECS. 1 and 3.—The plaintiff, in 1874, sued on a *San* mortgage, dated 15th November 1861, *i. e.*, five months before the passing of Bombay Act V of 1862, to recover a sum of

money by sale of the mortgaged property, which formed part of a *bhāg* in a *Bhāgdāri* village, which *bhāg*, the defendant had purchased at a Court's sale subsequent to the date of the mortgage.

Held (assuming Section 1 of the Act to apply) that it does not bar the right of action; that, therefore, a Civil Court would be bound to make a decree, even though it might anticipate that Section 1 of the Act would stand in the way of the execution of that decree.

Semble, that, after a decree has been passed against a portion of a *bhāg*, the Collector might recognize such portion as a division of the *bhāg*, if assured that justice required that the decree should be executed.

Held, further, that no retrospective operation can be given to Section 1 of the Act, so as prejudicially to affect existing rights. The words "attachment, or sale by the process of any civil court," used therein, were intended to prevent attachment and sale under simple money decrees, and not to prevent the sale of mortgaged property in satisfaction of a valid mortgage.

Held, also, that the purchaser at a Court's sale buys only the right, title, and interest of the debtor, burdened with all valid liens, such as a previous *San* mortgage. *Mathuradas v. Kalā* (7 Bom. H. C. Rep. 24, A. C. J.) and *Chintaman v. Shivram* (9 Bom. H. C. Rep. 304) followed. *Ranchoddās Dayāldās v. Ranchoddās Nānābhāi* . . . 581

VI of 1862.—The *Tālukdāri* Settlement Officer having assessed rent-free land, on the ground that it had been granted for service, and that service was no longer required,

Held, that this was not a sufficient defence to an action by the holder of the land, it not being shown that by the terms of the grant (assuming that there had been a grant of an estate burdened with service) the estate was determined by the remission of the service.

Held, further, that if the grant was the grant of an office remunerated

by the use of land, the right to assess was barred by the possession of a person, not claiming, under the grantee for a longer period than twelve years after the right to resume accrued under Act IX of 1871, Section 29, and Art. 130, Schedule II. *Keral Kuber v. The Talukdārī Settlement Officer* . 583

IX of 1863, Sec. 2.—Possession of adulterated cotton, even though accompanied by a knowledge that the cotton is adulterated, is not sufficient to sustain a conviction of fraudulent adulteration or deterioration of cotton under the Cotton Frauds Act. No criminality attaches to such possession, till the cotton is actually offered for sale or compression. *Reg. v. Hanmant Gánda* 228

V of 1864.—A Mámlatdār's order under Bombay Act V of 1864 is not conclusive evidence of the facts of possession and dispossession between the parties, Section I of that Act gives to Mámlatdārs' Courts jurisdiction in case of dispossession within six months from the date of such dispossession, and relates to immediate possession; and under Section 15, the party to whom such immediate possession is given by the Mámlatdār, or whose possession he shall maintain, shall continue in possession until ejected by a decree of a Civil Court. *Basapa v. Lakshmapa* 624

See REVENUE COURTS.

I of 1865. Sec. 2, Cl. (j) and Secs. 36 and 42, Cl. 1st.—D, widow of a Hindu *Mírásdār*, by a duly-registered deed, dated the 24th of November 1869, mortgaged the *Mírás* land of her deceased husband to R. M. for Rs. 150. Subsequently, on the 5th July 1872, D executed a *rāzinnāma* of the land in favour of R. G.

Held, that the mortgage bound D's estate in the *Mírás* land, as a Hindu widow, that whether the property is regarded as *Mírás*, or as that of an ordinary occupant, it is transferable under Section 36 of Bombay Act I of 1865; that when D executed the *rāzinnāma*, there was nothing

left in her to relinquish or otherwise deal with more than the equity of redemption; that, consequently, R. G. took nothing by the *rāzinnāma* executed in his favour by D, except this equity of redemption.

Tārāchand v. Laksham (I. L. R. 1 Bom. 91) distinguished

The distinction between the present and the case of a purchase at a sale for arrears of Government land revenue is that, at such last mentioned sale, the purchaser takes the land discharged of all encumbrances, inasmuch as the Government land revenue is the paramount charge upon the land.

Interest allowed not exceeding the principle, following the rule of *Damdapūt Rāmchandra Mākeswar v. Bhimrao Rāyji* 577

Sec. 2, Cls. j, k, l, and Sec. 48.—See KAPULÁYATDAR KHOT.

Secs. 35 and 48.—The meaning of Clause 8, Section 7 of the Court Fees' Act VII of 1870, is that a person suing to set aside an attachment on land shall in no case be called upon to pay a higher fee than he would have to pay if he were suing for possession of the land.

Accordingly, in a suit for setting aside a summary attachment, under Bombay Act I of 1865, placed by the Collector on land held on a settlement for a period not exceeding thirty years, the value was held to be five times the assessment, and the stamp duty calculated upon it irrespective of the actual market value, or the amount for which the land was attached.

The holder of a cocoanut oart in Bandora, in the island of Salsette, in the Thana District, paying an annual assessment of Rs. 39 to Government built a bungalow upon it without the permission of the Collector, who under the rule purporting to have been issued by the Government of Bombay on the 1st February 1869 in accordance with the provisions of Section 35 of Bombay Act I. of 1865, demanded from him a fine equal to sixty times the assessment, and on the plaintiff's failure to pay the fine

summarily attached the land under the provisions of Section 48 of that Act;—

Held (1st).—That the Government of Bombay had no authority to make the rule of 1st February 1869, and that Section 35 of the Survey Act providing no penalty for building without the Collector's permission, the attachment was illegal.

(2ndly).—That the expressions "Government Land" and "Land belonging to Government" in Bombay Act I of 1865 mean land of which Government is the proprietor, and do not apply to land in which the proprietary right in the soil vests in a private individual, whether or not it be subject to the payment of assessment to Government.

(3rdly).—That by virtue of uninterrupted enjoyment for more than thirty years the plaintiff had, under Section I of Regulation V of 1827, acquired a prescriptive title to the land, and had become its absolute proprietor.

Quære—Whether the amount of the fine contemplated in Section 35 of Bombay Act I of 1865, if not paid, is a charge leviable by summary attachment under Section 48. *The Collector of Thána v. Dáddbhái Bomanji* 352

I of 1873.—The Trustees of the Port of Bombay have the power to record their decisions and opinions with regard to matters connected with the business they have under their Act power to transact; whether such decisions or opinions are confined to statements of what they believe to be actual facts, or extend also to the giving of advice for the conduct of their successors in office with regard to such business, and whether the expression of such decisions, opinions, or advice, may or may not contain statements injurious to the character or reputation of others. *Shepherd v. The Trustees of the Port of Bombay* 132

See INJUNCTION. LIBEL.

VI of 1873, Sec. 86. *See* JURISDICTION, 3.

III of 1874, Secs. 33, 34, 35, 36.—*See* ADOPTION.

III of 1876.—*See* REVENUE COURTS.

ADOPTION.—

The sanction of Government to an adoption by a *Kulkárni* or his widow, or by a co-parcener in a *Kulkárniship* or his widow, is not necessary to give it validity, nor has Government any right to prohibit or otherwise intervene in such an adoption. *Narhar Govind Kulkárni v. Náráryan Vithal* . . . 607

See SUIT TO SET ASIDE ADOPTION.

ADULTERATION.—*See* BOMBAY ACT IX of 1863.

ADULTERY.—*See* HINDU LAW, 2.

ADVERSE POSSESSION.—*See* ACT, XXIII of 1871, Secs. 3, 4, and 6, LIMITATION ACT (Bom) I of 1865, Sec. 35.

AFFIDAVIT.—*See* PRACTICE, 4.

AGREEMENT.—*See* ACT X of 1866, Sec. 4. ACT I of 1872, Sec. 92.

AGENT.—*See* ACT VIII of 1859, Sec. 2.

AMENDMENT OF DECREE.—*See* PRACTICE, 1.

ANCESTRAL ESTATE.—*See* UNDIVIDED HINDU FAMILY HINDU LAW, 7, 8.

ANNUITY.—*See* ACT VII of 1870, Sched. I., Cl. 2.

APPEAL.—*See* ACTS, VIII of 1859, Secs. 119 and 348; X of 1872, Sec. 314; ACT X of 1872, Sec. 288. PRACTICE, 3, 5.

APPLICATION.—*See* LIMITATION, I. ACT IX of 1871, Sched. II., Cl. 85, and Cls. 166 and 167.

APPOINTMENT OF A KAZI.—*See* KAZI.

APPORTIONMENT.—*See* ACCOUNT.

APPROVER'S TESTIMONY.—*See* EVIDENCE, 3. ACT X of 1872, Sec. 347.

ASSESSMENT.—*See* ACT (Bom.) I of 1865, Sec. 35.

ASSIGNMENT.—*See* Possession
MIRAS

ASSIGNMENT OF DECREE.—*See*
Act VIII of 1871, Sec. 17.

ASSOCIATION.—*See* Act X of 1866,
Sec. 4

ATTACHMENT.—*See* Act (Bom.) I
of 1865, Sec. 35. COURT FEES.

ATTESTATION.—*See* Act X of 1865,
Sec. 50, Cl. 3.

ATTORNEY AND CLIENT.—*See* Act
IX of 1871, Sched. II, Cl. 85.

AUTHORITY OF CASTE TO DE-
CLARE A MARRIAGE VOID—

Courts of Law will not recognize the
authority of a caste to declare
a marriage void, or to give permis-
sion to a woman to remarry. *Req.*
v. Sambhu . . . 347
See Act XLV of 1860, Sec. 494.

AWARD OF COMPENSATION.—*See*
Act X of 1872, Sec. 209

BHAGDARI.—*See* Act (Bom.) V of
1862, Secs. 1 and 3.

BIGAMY.—*See* Act XLV of 1860, Sec.
494

BILL OF COSTS.—*See* Act IX of 1871,
Sched. II, Cl. 85.

BLINDNESS.—*See* HINDU LAW, 4, 5.

BOMBAY CIVIL COURTS ACT.—*See*
Act XIV of 1859, Sec. 24.

BOND—

Where the defendant executed to the
plaintiff a bond for the payment of
the balance found to be due from
the defendant to the plaintiff upon
an adjustment of the account of
their mutual dealings, which bond
contained the following stipulation :
—"I shall pay the money after
causing the payment to be entered
on the back of this bond, or after
taking a receipt for the same. I
shall not lay any claim to any pay-
ment made except in this way."

Held that, though the defendant at
the time of the adjustment disputed
the correctness of the account, yet
that, by having executed the bond

and made payments under it, he
must be held to have waived his
objection, and in a suit on the bond
could not be permitted to reopen the
question of the correctness of the
balance, though he might possi-
bly have been allowed to do so
had he alleged that he had discover-
ed errors in the account after the
execution of the bond, and had he
specified some of the alleged errors.

Held, also, that the stipulation in the
bond could not be permitted to con-
trol Courts of Justice as to the
evidence which keeping within the
rules of the general law of evidence
in this country, they may admit of
payments; and the Anglo-Indian
law of evidence, not excluding oral
evidence of payments, it would be
against good conscience and the
policy of the law to reject it, though
the absence of indorsements is a
circumstance of some importance,
which ought not to be overlooked,
but is by no means conclusive.

Belana Patiah v. Fasantum Chinna
(Mad S. D. A. Rep. for 1855, pp.
49 and 50) impeached, *Nashachel-
lum Chetty v. Gvindappa* (5 Mad
H. C. Rep. 451), *Kashinath Bulal*
Ola v. Narain Jan (Bom. Sp. Ap.
438 of 1872), and *Nagar Mull v.*
Azmoonah (1 N. W. P. H. C. Rep.
146) approved *Narayan Undir Patil*
v. Motilal Rundes . . . 45

BRITISH TERRITORY.—*See* Act X
of 1872, Sec. 67. JURISDICTION, 2.

BRITISH TERRITORY IN INDIA,
POWER TO CEDE.—*See* CESSION.

BUILDING.—*See* Act I (Bom.) of 1865,
Sec. 55.

CARRIER.—*See* RAILWAY COMPANY.

CASTE.—*See* Act XXI of 1850, Act
XLV of 1860, Sec. 404.

CAUSE OF ACTION.—*See* JURISDIC-
TION, 1.

CERTIFICATE.—*See* Act XXIII of
1871. CONFESSION.

CESSION OF TERRITORY—

Seem that the general and abstract
doctrine laid down by the High
Court at Bombay, that it is beyond

the power of the British Crown without the consent of the Imperial Parliament, to make a cession of territory within the jurisdiction of any of the British Courts in India, in time of peace, to a Foreign Power, is erroneous.

Where an objection is taken to the territorial jurisdiction of a British Court, on the ground that the territory over which the jurisdiction of the Court extended has been ceded to a Foreign Power, such a cession must be regularly proved and cannot be established by uncertain inferences from equivocal acts.

An agreement on the part of the Government of India, purporting to transfer certain villages, forming part of a Regulation Province within the Bombay Presidency, and subject to ordinary British jurisdiction, to the extraordinary jurisdiction of the Political Agency of a Native State, does not constitute a cession of territory.

A rearrangement of jurisdiction within British territory in India, by the exclusion of a certain district from the Regulations and Codes there in force, and from the jurisdiction of all the High Courts, with a view to the establishment therein of a Native jurisdiction under British supervision and control, cannot be carried out except by legislation, under the provisions of the Imperial Statutes 3 and 4, Will. IV, Cap. 85, Secs. 43, 24, and 25, Vic. Cap. 67, Secs. 22 and 24 and 25, Vic., Cap. 104, Sec. 9.

The Governor-General in Council being precluded by the Act XXIV and XXV Vic. Cap. 67, Sec. 22, from legislating directly as to the sovereignty or dominion of the Crown over any part of its territory in India, or as to the allegiance of British subjects, cannot by any legislative Act, (*e g*, by the "The evidence Act of 1872," Sec. 113) purporting to make a notification in the *Government Gazette*, conclusive evidence of a cession of territory, exclude judicial enquiry as to the nature and lawfulness of that cession.

Where the foundation of the jurisdiction of a British Court over the subject matter of a suit and the parties thereto is territorial, and the territory by a valid cession ceases to be British, the jurisdiction of the Court can no longer be exercised, whatever be the stage or condition of the litigation at the time of such cession. *Damodhar Gordhan v. Devrám Kánjé* 367

CHARGES.—See ACT X of 1872, Sec. 452

CHILDLESS WIDOW OF PREDECEASED SON OF A PARSI INTESTATE.—See ACT XXI of 1865.

CIVIL ACTION.—See DAMAGES.

CIVIL PROCEDURE CODE.—See ACT VIII of 1859.

CLERICAL ERROR.—See PRACTICE, 1.

CODE OF CIVIL PROCEDURE.—See ACT VII of 1859.

CODE OF CRIMINAL PROCEDURE.—See ACT X of 1872.

COLLECTOR.—See MIRAS. ACT XXIII of 1871, JURISDICTION, 3; ACT XX of 1864, Secs. 11 and 15, ACT XXIII of 1871; ACT (Bom.) V of 1862, ACT (Bom.) I of 1865, Sec. 35.

COMBINED SENTENCE FOR SEVERAL OFFENCES.—See ACT X of 1872, Sec. 314

COMMISSIONER'S REPORT.—See ACCOUNTS.

COMMITMENT.—See ACT X of 1872, Sec. 473.

COMMON LAW RULES OF THE SUPREME COURT.—See ACT IX of 1871, Sched. II, Cl. 85.

COMPANY—

Distinction pointed out between the case of a person who agrees to take shares in a projected Company upon the faith of a prospectus, and one who does so, upon the faith of a document purporting to be the proposed Memorandum of Association of such a Company.

* The defendant, on being shown a document purporting to be the Memorandum of Association of a projected Company, signed his name to it, as having taken 4 shares. This document was not registered as the Memorandum of Association of the Company, but another was, which differed from it in omitting, in its 4th clause, the word *yearly* before the word *profits*, on which the Company were to pay a certain commission to the Secretaries, Agents, and Treasurers, and in adding to its 6th clause a provision empowering the Company by special resolution in general meeting to subdivide the shares.

Held that the first was not, but the second was, a material variance.

Quere—Whether the provision empowering the Company to subdivide the shares was illegal. But, even if it was,

Held that the effect of it being practically to alter the position of the defendant from what it would have been had the document signed by him been registered as the Memorandum of Association of the Company, the defendant was not a shareholder in the Company registered. *In re the Financial Corporation* (L. R. 2 Ch. Ap. 714) commented on. *Anandji Visram v. The Narind Spinning and Weaving Company, Limited* . . . 320

See Act X of 1866, Sec. 4.

COMPENSATION.—*See* Act X of 1872, Sec. 209.

COMPLAINANT.—*See* Act X of 1872, Sec. 209.

COMPOUNDING OF OFFENCES—

A warrant case of a nature not compoundable under Sec. 214 of the Indian Penal Code was “dismissed” on the parties coming to an amicable settlement.

Held that the “dismissal” was equivalent to a discharge under Sec. 215 of the Code of Criminal Procedure, and the composition did not affect the revival of the prosecution, if that should otherwise

be thought necessary or expedient. *Reg. v. Davimá* . . . 64

2. Whenever the words “voluntarily,” “intentionally,” “fraudulently,” “dishonestly,” or others whose definition involves a particular intention, enter along with a specified act into the description of an offence, the offence not being one irrespective of the intention, is not one which the exception to Sec. 214 of the Indian Penal Code, by itself, allows to be compounded. The offence, to admit of compromise, must be one in this sense irrespective of the intention, and it must be one for which a civil action may be brought at the option of the person injured, instead of criminal proceedings. The offence of voluntarily causing grievous hurt cannot, accordingly, be compounded. *Reg. v. Sethá Bhárá* (10 Bom. H. C. Rep. 68) disapproved. *Reg. v. Rahimat* . . . 147

CONDONATION OF IRREGULARITY WHERE ACCUSED NOT PREJUDICED.—*See* Act X of 1872, Sec. 452.

CONFESSION—

A confession recorded under Sec. 122 of the Criminal Procedure Code to be admissible in evidence, must not only bear a memorandum that the Magistrate believed it to have been voluntarily made, but also a certificate, under Sec. 346 of the Code, that it was taken in the Magistrate's presence and hearing, and contains accurately the whole of the statement made by the accused person.

No oral evidence can be received to prove the fact of the confession, if the confession itself be inadmissible. *Reg. v. Bdi Ratan* (10 Bom. H. C. Rep. 166) followed. *Reg. v. Shinyá* . . . 291

CONFESSION OF CO-PRISONER
See EVIDENCE, 3.

CONFIRMATION.—*See* Act X of 1872, Sec. 314.

CONJUGAL RIGHTS.—*See* HUSBAND AND WIFE.

CONSEQUENTIAL RELIEF.—See
DECLARATORY DECREE.

CONSIDERATION.—See ACT VIII
of 1871, HUNDI.

CONSTITUTION OF JURY.—See
ACT X of 1875, SECS. 32, 33, 37.

CONSTRUCTION—

An enactment of a character so arbitrary as Act XXIII of 1871, ought to be construed strictly, and the Courts should not extend its operation further than the language of the Legislature requires. *Rājui Nārāyan v. Dādāji Bāpuji* . . . 523

See ACT XXIII of 1871, SECS. 3, 4, and 6.

A penal statute should, when its meaning is doubtful, be construed in the manner most favourable to the liberties of the subject, and this is more especially so when the penal enactment is of an exceptional character. *Reg. v. Bhista* . . . 308

See ACT XXXI of 1860, Sec. 32, Cl. 6.

Though as stated in *Krishnarāv v. Rangrāv* (4 Bom. H. C. Rep. 1, A. C. J.), "*Sanadi grants in inām, suranjām, &c., are, generally speaking, more properly described as alienations of the royal share in the produce of the land, (i.e., of land-revenue) than grants of land although in popular parlance occasionally so called,*" yet such is not invariably the case.

If words are employed in a grant which expressly, or by necessary implication, indicate that Government intends that, so far as it may have ownership in the soil, that ownership shall pass to the grantee, neither Government nor any person subsequently to the date of the grant deriving under Government can be permitted to say that the ownership did not so pass, unless there are in the grant such detailed provisions as show that such words are limited in their operation.

A *sanad* by the State purporting to grant a village in *inām* "including the waters, the trees, the stones and quarries, the mines, and the hidden treasures, but excluding the *Hakdārs* and *Ināmdārs*."

Held to be a grant by the State of such proprietary right as it had in the soil of the village to the grantee.

It is not open to the grantor to say that such words as the above mean nothing but land-revenue.

The saving of the rights of the *Hakdārs* and *Ināmdārs* does not prevent the property in the soil, so far as it can be regarded as vested in Government, from passing to the grantee. *Rājui Nārāyan v. Dādāji Bāpuji* . . . 523

See ACT XXIII of 1871, SECS. 3, 4, and 6. DECREE, 1, 2. LIMITATION 2.

CONTEMPT OF COURT.—See ACT X of 1872, Sec. 473.

CONTRACT.—See CONTRACT OF PARTNERSHIP. ACT X of 1866, Sec. 4; ACT I of 1872, Sec. 92. HINDU LAW, 3.

CONTRACT OF PARTNERSHIP—

A contract between a partner and his co-partners for remuneration to the former for the management of the partnership business by a commission on the sale, during his life-time, does not, in the absence of any express agreement to that effect, imply a renunciation of the right of the co-partners to dissolve the partnership if they find that it cannot be carried on, except at a loss: nor does it imply an obligation to pay the managing partner compensation in case the partnership is dissolved for that reason. *Rhodes v. Forwood* (L. R. 1 Ap. Ca. 256) referred to and approved. *Chwasjee Nāndbhoy v. Lālibhoy Vullubhoy* . . . 468

CONVICTION.—See ABETMENT ACT X of 1872, Sec. 314. JURY. SENTENCE.

COPARCENER.—See UNDIVIDED HINDU FAMILY.

CORROBORATION.—See EVIDENCE, 3.

COSTS.—*See* ACT IX of 1871, Sched. II, Cl. 85. **DAMAGES. LIBEL.**

COTTON.—*See* BOMBAY ACT IX of 1863.

COTTON FRAUDS ACT.—*See* BOMBAY ACT IX of 1863.

COUNSEL.—*See* PRACTICE 2.

COURT FEES.—

The Crown has the first claim to the proceeds of a pauper suit to the extent of the amount of the Court fee that would have been payable at the institution of the suit, had the plaintiff not been a pauper, and Sec. 309 of the Code of Civil Procedure does not preclude the Crown or its representative from urging its prerogative *Ganpat Patayá v. Collector of Kanara*. . . . 7
See ACT VII of 1870.

COURT FEES ACT.—*See* ACT VII 1870, Secs. 5 and 7; ACT XIV of 1869, Sec. 24.

COURT'S SALE.—*See* ACT (Bom.) V of 1862.

COURT'S SALE OF ANCESTRAL PROPERTY.—*See* HINDU LAW, 7.

CREDIT IN ACCOUNT.—*See* HUNDI.

CRIMINAL PROCEDURE CODE.—*See* ACT X of 1872.

CROWN, PREROGATIVE OF.—*See* COURT FEES. **CESSION OF TERRITORY.**

CRUELTY.—

The criterion of legal cruelty justifying a wife's desertion is the same in this country as in England. *Yamundabdi v. Nardyan Moreshwar Pendse*. 164
See HUSBAND AND WIFE.

CULPABLE HOMICIDE.—

Where the prisoner knocked his wife down, put one knee on her chest, and struck her two or three violent blows on the face with the closed fist, producing extravasation of blood on the brain, and she died in consequence, either on the spot, or very shortly afterwards.

Held, that there being no intention to murder, and the homicide in

ordinary course of nature to cause death, the offence committed by the prisoner was not murder, but culpable homicide not amounting to murder. *Raj. v. Govind*. . . 342

See ACT X of 1872, Sec. 288.

CUSTOM OF SHROFFS.—*See* HUNDI.

DACOITY IN THE GAYAKWAD'S TERRITORY.—*See* ACT X of 1872, Sec. 67. **JURISDICTION, 2.**

DAMAGES.—

No action is maintainable for damages occasioned by a civil action, even though brought maliciously and without reasonable and probable cause; nor will it lie to recover costs awarded by a civil court. *Prinshankar Shirshankar v. Govind Lal Parbhudas*. . . . 467
See HUSBAND AND WIFE.

DAMDUPAT.—

The rule of *Damdapat* does not apply to amounts due on decrees. *Bal-krishna Bhalchandra v. Gopal Raghunath*. . . . 73
See HINDU LAW, I. ACT (Bom.) I of 1865, Sec. 2.

DASIPUTRA.—*See* HINDU LAW 2.

DECLARATORY DECREE.—

B died, leaving him surviving two widows, K and R. Some time after B's death, P, a son, was born to R on 15th September 1848. Some time before P's birth, a portion of B's *watan* lands had been made over to K by the Revenue authorities. The remaining portion of B's *watan* lands was placed by Government under sequestration, which was not removed until 1865. Shortly after P's birth, R petitioned the Revenue authorities, claiming the *watan* lands of B for P as B's son. On 15th February 1849, the Revenue authorities on inquiry held that P was not the son of B, and decided that K was entitled to retain the *watan* lands of B. On 16th March 1872, K adopted a son BA. In a suit brought by P on 4th December 1872 for a declaration that P was the son of B, and for setting aside the adop-

Held that under the circumstances a suit for a declaratory decree would lie; for the plaintiff, even if his claim to the property were barred as against K, would yet be entitled to obtain an injunction against any intervention of BA in performing the *shraddh* or other ceremonies for the benefit of B, or assuming the *status* of B's adopted son, and, moreover, the Legislature has in Act VII of 1870 and Act IX of 1871 recognized the right of a person to bring a suit to set aside an adoption as a substantive proceeding, independent of any claim to property. *Kalová kom Bhujangrav v. Padapá valad Bhujangrav* . . . 248
See Act XXIII of 1871, Secs 3, 4 and 6; Act XIV of 1867, Sec. 24

DECREE—

1. Where the Court of first instance puts upon its own decree a construction which to the Appellate Court appears to render the decree erroneous, and the decree, on the face of it, admits of another construction, which to the Appellate Court appears to render the decree correct, the Appellate Court will adopt the latter construction.

A clerical error in the decree appealed against was ordered to be rectified at the hearing of the appeal. *Hirji Jiná v. Náran Mulji* . . . 1

2. A note of the judgment of the Court taken by a Deputy Registrar cannot be consulted for the purpose of explaining or aiding in the construction of a decree. *Sumár Ahmed v. Háji Ismáíl Háji Habíb* . . . 158

See ACCOUNTS.

3. *Semble* that a decree for restitution of conjugal rights between Muhammadans or Hindus may be enforced under Sec. 200 of Act VIII, of 1859, *Yámunábái v. Náráyan Moreshtar Pendse* . . . 164

See DECREE OF SMALL CAUSE COURT. HUSBAND AND WIFE. DECLARATORY DECREE. HINDU LAW, 1. UNDIVIDED HINDU FAMILY. ACT IX of 1871, Sched II., Cls. 166 and 167.

DECREE, ASSIGNMENT OF.—See Act VIII of 1871, Sec. 17.

DECREE, EXECUTION OF.—See LIMITATION, 1.

DECREE OF SMALL CAUSE COURT—

Although the Court of Small Causes at Bombay has power to enforce its decree against moveable property only, yet if that decree be transmitted to a Court to which the Code of Civil Procedure applies, the latter can, under Section 287 of that Code, enforce it against immoveable property also.

Quare—Whether a Court executing the decree of a Small Cause Court under Sec. 78 of Act IX of 1850 could enforce it against immoveable property. *In re Joggivan Nándabháí* . . . 82

DECREE BEFORE THE DATE OF ACT XXIII, OF 1871.—See Act XXIII of 1871.

DECREE EX PARTE.—See Act VIII. of 1859, Sec. 119.

DEED.—See Act I of 1872, Sec. 92.

DEED OF PARTITION.—See Act XX of 1866, Sec. 17.

DEFAULT.—See Act XIV, of 1859, Sec. 1, Cl. 10.

DEPOSIT OF TITLE DEEDS.—See EQUITABLE MORTGAGE.

DESERTION.—See HUSBAND AND WIFE.

DHAREKARI.—See KABULAYATADAR KHOT.

“DISHONESTLY.”—See COMPOUNDING OF OFFENCES, 2.

“DISMISSAL” OF A WARRANT CASE.—See Act X, of 1872, Sec. 215.

DISQUALIFICATION TO INHERIT.—See HINDU LAW, 2, 4, 5, 6.

DISSOLUTION OF PARTNERSHIP.—See CONTRACT OF PARTNERSHIP.

DISTRICT MAGISTRATE.—See JURISDICTION, 3.

DOCUMENTS.—See PARTNERSHIP.

EARNEST MONEY.—*See* ACT VIII, of 1871.

EJECTMENT.—*See* MIRÁS.

ENTRIES IN ACCOUNTS.—*See* ACT X of 1872, Sec. 452.

EQUITABLE MORTGAGE—

Where the plaintiff had advanced to the 1st defendant Rs. 38,000, and had agreed to advance Rs. 27,000 more, the whole Rs. 65,000 to be secured by a mortgage of the 1st defendant's immoveable property, and the 1st defendant had deposited with the plaintiff the title-deeds of his immoveable property, for the purpose of enabling him to get a mortgage-deed prepared, and had agreed to execute such mortgage-deed on payment to him by the plaintiff of the balance of the Rs. 65,000, and the title-deeds were afterwards returned by the plaintiff to the 1st defendant for the purpose of enabling him to clear up certain doubts as to his title to some of the premises comprised in the deeds, and such deeds were not subsequently returned by the 1st defendant, nor were others deposited in lieu thereof, and the balance of the Rs. 65,000 was not paid by the plaintiff to the 1st defendant,

Held that there was an equitable mortgage to the plaintiff to secure Rs. 38,000, so far as concerned the property comprised in the deeds.
Dāyāl Jairāj v. Jivraj Ratansi 237

See VENDOR AND PURCHASER.

ERROR IN ACCOUNT.—*See* BOND.

ERROR IN DECREE.—*See* PRACTICE, 1. ESTOPPEL—

Where the defendant executed to the plaintiff a bond for the payment of the balance found to be due from the defendant to the plaintiff upon an adjustment of the account of their mutual dealings,—which bond contained the following stipulation: "I shall pay the money after causing the payment to be entered on the back of this bond, or after taking a receipt for the same. I shall not lay any claim to any payment made except in this way."

Held that, through the defendant at the time of the adjustment disputed the correctness of the account, yet, by having executed the bond and made payments under it, he must be held to have waived his objection, and in a suit on the bond could not be permitted to re-open the question of the correctness of the balance, through he might possibly have been allowed to do so had he alleged that he had discovered errors in the account after the execution of the bond, and had he specified some of the alleged errors.

Held, also, that the stipulation in the bond could not be permitted to control Courts of Justice as to the evidence which, keeping within the rules of the general law of evidence in this country, they may admit of payments; and the Anglo-Indian law of evidence not excluding oral evidence of payments, it would be against good conscience and the policy of the law to reject it.

Bekana Tatiah v. Vasuntum Chinna (Mad. S. D. A. Rep 1855, pp. 49 and 50) impeached; *Sushachellum Chetty v. Govindappa* (5 Mad. H. Rep. 451); *Kashindata Balal Oka v. Narria Jan* (Bom. Sp. Ap. 438 of 1872); and *Nugur Mull v. Aseemoolah* (1 N. W. P. H. C. Rep. 146) approved. *Nirdyan Undir Patil v. Motilal Ramdas* . . . 45
See MORTGAGE, ACT XXIII, of 1871, Secs. 3, 4, and 6.

EUROPEAN BRITISH SUBJECT.—
See ACT X of 1875, Secs. 32, 37.

EVIDENCE—

1. No oral evidence can be received to prove the fact of a confession if the confession itself be inadmissible.
Reg. v. Shieyd . . . 219
See CONFESSION.
2. Where the defendant executed to the plaintiff a bond for the payment of the balance found to be due from the defendant to the plaintiff upon an adjustment of the account of their mutual dealings,—which bond contained the following stipulation: "I shall pay the money after causing the payment to be entered on the back of this bond or after taking a receipt for the same. I shall not

lay any claim to any payment made except in this way."

Held that the stipulation in the bond could not be permitted to control Courts of Justice as to the evidence which, keeping within the rules of the general law of evidence in this country, they may admit of payments; and the Anglo-Indian law of evidence not excluding oral evidence of payments, it would be against good conscience and the policy of the law to reject it, though the absence of indorsements is a circumstance of some importance, which not to be overlooked, but is by no means conclusive.

Bekana Tatiah v. Vasuntum Chinna (Mad. S. D. A. Rep. for 1855, pp. 49 and 50) impeached; *Sashachellum Chetty v. Govindappa* (5 Mad. H. C. Rep. 451); *Kashinath Balal Oka v. Narria Jan* (Bom. Sp. Ap. 438 of 1872); and *Nugur Mull v. Aseemoolah* (1 N. W. P. H. C. Rep. 146) approved. *Narayan Undir Patil v. Motilal Ramdas* . . . 45

3. A conviction based on the testimony of approvers, uncorroborated as to the identity of the accused person, cannot be sustained, and confessions of co-prisoners, implicating him, cannot be accepted as sufficient corroboration of such testimony. *Reg. v. Budhu Nanku* 475

EVIDENCE OF ACCUSED ILLEGALLY PARDONED.—*See* ACT X of 1872, Sec. 452.

EVIDENCE OF ORAL AGREEMENT CONTEMPORANEOUS WITH A DEED OF SALE.—*See* ACT I of 1872, Sec. 92.

EVIDENCE OF VALUE.—*See* HINDU LAW, 8.

EXCLUSION FROM INHERITANCE.—*See* HINDU LAW, 2, 4, 5, 6, 7, 8.

EXECUTION.—*See* ACT IX of 1871, Sched. II. Cls. 166 and 167; XXIII of 1871; V (Bom.) of 1862. DECREE OF SMALL CAUSE COURT. LIMITATION, 1. MORTGAGE. UNDIVIDED HINDU FAMILY,

OF WILL.—*See* ACT X of 1865, Sec. 50, Cl. 3.

EX PARTE DECREE.—*See* ACT VIII of 1859, Sec. 119.

EXTINCTION OF MIRAS RIGHT.—*See* MIRAS.

EXTRADITION.—*See* ACT X of 1872, Sec. 157.

FALSE EVIDENCE.—*See* ACT X of 1872, Sec. 473.

FINE.—*See* ACT XXXI of 1860, Sec. 32, Cl. 6.

FORFEITURE OF RIGHTS OR PROPERTY.—*See* ACT XXI of 1850.

FRAUD.—*See* VENDOR AND PURCHASER.

FRAUDULENT INTENT.—*See* RAILWAY COMPANY. COMPOUNDING OF OFFENCES, 2. ACT (Bom.) IX of 1863.

GAIN, ACQUISITION OF.—*See* ACT X of 1866, Sec. 4.

GAYAKWAD'S TERRITORY.—*See* ACT X of 1872, Sec. 67. JURISDICTION, 2.

GIFT.—*See* HINDU LAW, 8, 9.

GOVERNMENT, GRANT OF LANDS BY.—*See* ACT XXIII of 1871.

GOVERNMENT LAND.—*See* ACT I (Bom.) of 1865, Sec. 35.

GOVERNMENT OFFICER.—*See* ACT XX of 1864, Secs. 11 and 15.

GRIEVOUS HURT.—*See* COMPOUNDING OF OFFENCES, 2.

GUILTY KNOWLEDGE.—*See* BOMBAY ACT IX of 1863, Sec. 2.

HAK.—*See* ACT XXIII of 1871.

HEREDITARY OFFICE.—*See* KASTI ACT XXIII of 1871.

HIGH COURT.—*See* JURX, ACT X of 1872, Sec. 288, and Chapter XXX.

HIGH COURT, CRIMINAL PROCEDURE ACT.—*See* ACT X of 1875, Sec. 35.

HIGH COURT, REFERENCE TO— See PRACTICE, 2.

HINDU LAW—

The rule of Hindu Law which limits the amount recoverable at one time by way of interest to the amount of the principal, does not apply to an amount recoverable in execution of the decree of a Civil Court. *Balkrishna Bhalchandra v. Gopal Raghunath* . . . 73

See *Ramachandra v. Bhimrao* . . . 577

2. The general result of the authorities, both juridical and forensic, is that among the three regenerate classes of Hindus (Brahmans, Kshatriyas, and Vaishyas) illegitimate children are entitled to maintenance, but cannot inherit, unless there be local usage to the contrary; and that, among the Sudra class, illegitimate children in certain cases, at least, do inherit. The extent to which this right exists considered, and the texts of Hindu Law books bearing on the point referred to.

According to Vijnyaneshvara, the author of the *Mitakshara* (Chap. I, S. 12), the father of an illegitimate son by a *Dasi* among Sudras may in his (the father's) lifetime, allot to such son a share equal to that of a legitimate son, and, if the father die without making such allotment, the illegitimate son by the *Dasi* is entitled to half the share of a legitimate son, and if there be no legitimate son and no legitimate daughter or son of such a daughter, the illegitimate son by the *Dasi* takes the whole estate. If, however, there be a legitimate daughter, or legitimate son of such a daughter, the illegitimate son would take only half of the share of a legitimate son, and such daughter or daughter's son would take the residue of the property, subject to the charge of maintaining the widow of the deceased proprietor.

See dictum of Lord Cairns in *Sri Gajapati Radika v. Sri Gajapati Anantam* (28 Moore Ind. Ap. 497; 5 C. 6 Beng. L. R. 202; 14 Calc. W. P. C. 33, reversing 2 Mad. H. C. Rep. 389).—Supposing the sons, or either of them, to have

been legitimate, the widow (of Padmanabha) could have been entitled to maintenance only. Had both the sons been illegitimate, their claims, unless some special custom governed the case, which is not in proof, would have been to maintenance only. In this last-named case the widow would have had the ordinary estate of a Hindu widow—commented upon and explained.

The terms *Dasi* and *Dasiputra*, as defined by various writers on Hindu Law, discussed, and the rights by inheritance of a *Dasiputra* considered.

The condition that, in order to entitle the illegitimate offspring of a Sudra woman by a Sudra to inherit the property of the latter or share in it, she should according to Jimuta Vahana and Nilkantha, be an unmarried woman, has in practice, been discarded in the Presidency of Bombay.

In this Presidency the illegitimate offspring of a kept woman, or continuous concubine, amongst Sudras are on the same level as to inheritance as the issue of a female slave by a Sudra.

The custom of *Pât* marriage among the Mahrattas, and *Nutra* amongst the inhabitants of Gujarat, referred to, and the authorities bearing on the subject considered and discussed.

The sons of a *Punarbhû* (twice-married woman) by a duly contracted *Pât* marriage, i. e., in accordance with the custom of the caste are legitimate, and, as to the right of inheritance and extent of shares, rank on a par with the sons by *lagna* marriage.

G, a Sudra woman was married to T, also a Sudra, by *Pât* marriage, without having received a *chhor chiti* (release) from her first husband, who was then living, or obtained any other sanction of her *Pât* with T:—

Held that the intercourse between G and T was adulterous, and that therefore, the plaintiff, their son, being the result of such intercourse, was not entitled to take as *heir* even to the extent of half a share, and

was not a *Dāsiputra* within the scope of Yajnyavalkya's text or recognized as such by other commentators. He was however, held entitled to maintenance, as he had been recognized by T as his son. *Rahi v. Govindā walad Teja* . 97

3. Under the Hindu Law a wife who has voluntarily separated from her husband, without any circumstances justifying her separation, is liable for debts contracted by her (even for necessities), although without her husband's consent; but her liability is limited to the extent of any *stridhan* she may have.

Bom. Sp. Ap. 261 of 1861 (decided 2nd Feb. 1863), and Bom. Sp. Ap. 461 of 1869 (decided 17th Jan. 1870), approved and followed. *Nathubhai Bhailal v. Javher Raji* . 121

4. According to the Hindu Law, as prevailing in the Bombay Presidency, blindness to cause exclusion from inheritance must be congenital.

Therefore, where the widow of a childless intestate, though proved to have been totally blind for some years before the death of her husband, was admitted not to have been born blind.

Held, that, such blindness did not prevent her from inheriting the property of her husband on his decease, *Murari Gokuldas v. Parvatibai* 177

5. Incurable blindness, if not congenital, is not such an affliction as, under the Hindu Law, excludes a person from inheritance. *Umabai v. Bhavu Padmanji* . 557

6. Incurable leprosy of the sanious or ulcerous type, contracted before partition excludes the person afflicted with it from a share in the ancestral estate. *Ananta v. Ramabai* . 554

7. Under the Mitākshara and Mayukha the son takes a vested interest in ancestral estate at his birth, But that interest is subject to the liability of that estate for the debts of his father and grandfathers.

The ancestral property of a Hindu father may be sold either by himself, or by a Civil Court having jurisdiction, in satisfaction of his debts not

contracted for illegal or immoral purposes and such sale will bind sons *in esse* at the time of the sale. *Girdharee Lal v. Kantoo Lal* and *Muddun Thakoor v. Kantoo Lal* (L. R. I. Ind. Ap. 321; S. C. 14 Beng. L. R. I. 187; 22 Calc. W. R. Civ. Rul.) followed. *Narayanacharya v. Narso Krishna* . 262

A Hindu governed by the Mitākshara law, who has two sons undivided from him, cannot, whether his act be regarded as a gift or a partition, bequeath the whole, or almost the whole, of the ancestral moveable property to one son to the exclusion of the other. *Ramachandra Dada Naik v. Dada Mahadev Naik*, (1 Bom. H. C. Rep., Appx. lxxvi) distinguished and explained.

A plaintiff entitled on partition to half the property in the hands of his brother is bound to bring into hotchpot any ancestral property, or property acquired from ancestral funds which may be in his own hands, but is not liable to account for money received by him from his father while living in commensality with him and his brother, the circumstances of such receipt not being of a kind to impute fraud.

Members of an undivided Hindu family making partition are entitled, as a rule, not to an account of past transactions, but to a division of the family property actually existing at the date of partition.

The statement in a will as to the value of the testator's property is no evidence thereof.

The acceptance by one brother of a certain sum of money in satisfaction of his own shares in 1868, though it might be evidence of the value of the ancestral property in that year, affords no indication of the value of that property in 1876.

In a partition suit the Court ought not to order an immediate money payment by the defendant to the plaintiff of his share in the outstanding debts due to the family estate, as if such outstanding debts had been recovered and the money were in the hands of the defendant.

As a member of an undivided Hindu family is not bound to effect a partition by paying a certain sum of money to his co-parcener or co-parceners, the Court, in a partition suit, ought not to award interest on money decreed to be paid by the defendant to the plaintiff. *Lakshman Dadd Nāik v. Rāmāchandra Dadd Nāik*. 561

9. A nuncupative will, or a verbal bequest, of his separate property made by a separated Hindu, beyond the limits of the ordinary original jurisdiction of the High Court of Bombay and not relating to any immoveable property to which the Hindu Will's Act (XXI 1870) applies, is valid. *Bhagvan Dallabh v. Kālā Shankar*. 641

HINDU PRISONER.—See ACT X of 1875, SECS. 32, 37.

HINDU WIDOW.—See ACT XXI of 1850. ACT (Bom.) I of 1865, Sec. 2.

HOTCHPOT.—See HINDU LAW. 8.

HUNDI.—

The plaintiff, as agent and banker of an Ajmir constituent, received a *hundi* for collection, and, on its acceptance by the drawee, credited the Ajmir constituent with the amount as of the date when the *hundi* would become payable.

Held that, as between the plaintiff and the Ajmir constituent, the plaintiff, upon such credit in account being given, became a holder for value.

Held, also, that on the *hundi* being dishonoured at due date by the drawee, the plaintiff was justified, by the usage of *shroffs*, in treating the Ajmir constituent as still entitled to credit for the amount and himself as a holder for value.

Held, also, that as between the Ajmir constituent and the first indorser (the defendant and appellant), the giving by the Ajmir constituent to the defendant of another *hundi*, which was never presented in Bombay for acceptance or payment, was a consideration for the indorsement by the defendant to the Ajmir constituent of the *hundi* sent by the latter to

the plaintiff and sued on by him *Mulchand Joharimal v. Sugachand Shindis* 23

See JURISDICTION, I.

HUSBAND AND WIFE—

In a suit by a hindu husband against his wife for the restitution of conjugal rights, the criterion of legal cruelty justifying, the wife's desertion, is the same in this country as in England, viz., whether there has been actual violence of such a character as to endanger personal health or safety, or whether there is the reasonable apprehension of it.

Every person who receives a married woman into his house, and suffers her to continue there after he has received notice from the husband not to harbour her, is liable to an action for damages or injunction, unless the husband has by his cruelty or misconduct forfeited his marital rights, or has turned his wife out of doors, or has, by some insult or ill-treatment, compelled her to leave him.

Seem that a decree for restitution of conjugal rights between Muhammadans or Hindus may be enforced under Sec. 200 of ACT VIII of 1859. *Yamunibai v. Narayan Moreshwar Pendse* 164

See HINDU LAW, 2, 3, ACT XLV of 1860, Sec. 494.

ILLEGAL AGREEMENT.—See ACT X of 1866, Sec. 4.

ILLEGAL POWERS.—See COMPANY.

ILLEGITIMACY.—See HINDU LAW, 2.

IMMOVABLE PROPERTY.—See DECREE OF SMALL CAUSE COURT.

IMPRISONMENT.—See ACT XXXI of 1860, Sec. 33, Cl. 6.

INCAPACITY FOR INHERITANCE.—See HINDU LAW, 2, 4, 5, 6.

INCONTINENCE—

A Hindu widow entitled to a bare or starving maintenance, under a decree made in a suit brought by her for maintenance against the representatives of her deceased husband,

is not to be deprived of the benefit of that decree by the fact that she has since its date been leading an incontinent life. *Honama v. Timannabhat* 549

See Act XXI of 1850.

INDIAN COMPANIES ACT.—See Act X of 1866.

INDIAN EVIDENCE ACT.—See Act I of 1872.

INDIAN PENAL CODE.—See Act XLV. of 1860.

INDIAN SUCCESSION ACT.—See Act X of 1865.

INDORSEMENT.—See Bond.

INDORSER.—See HUNDI, JURISDICTION, 1.

INFERIOR HOLDER.—See KĀBULĀYATDĀR KHOT.

INHERITANCE.—See HINDU LAW, 2, 4, 5, 6, 7, 8, 9, Act XXI of 1865.

INJUNCTION—

The Court will not grant an injunction to restrain the publication of a libel; nor to restrain, at the suit of an individual, an act of a corporate body, on the ground of such act being *ultra vires*, except where such individual has been damaged by such act in his rights of ownership, commodity, or easement.

There is no authority for the proposition that an individual is entitled to protection by way of injunction against the act of a corporation, though in excess of their powers, which affects that individual's character and reputation, whether private, professional or commercial, which he would not have been entitled to had the act complained of been committed by an individual defendant, on the ground that the act in question was one which the corporation had no power to do under their instrument of incorporation.

The Trustees of the Port of Bombay have the power to record their decisions and opinions with regard to matters connected with the busi-

ness power to transact; whether such decisions or opinions are confined to statements of what they believed to be actual facts, or extend also to the giving of advice for the conduct of their successors in office with regard to such business, and whether the expression of such decisions, opinions or advice may or may not contain statements injurious to the character or reputation of others.

Where, therefore, the plaintiff sought for an injunction to restrain the Trustees of the Port of Bombay from publishing two resolutions alleged to reflect injuriously on his character and reputation on the ground that it was not within the powers conferred on the Trustees by Bombay Act I of 1873 to discuss or pass resolutions affecting his character, and that the publication of such resolutions was calculated to injuriously affect him in his commercial relations with the Government.

Held that the injunction could not be granted.

Held, also, that though the Court, under certain circumstances, might have the power of so framing an order for injunction as to produce the effect of cancelling the minutes of a resolution recorded in the books of a corporate body, yet that it could not order the Trustees of such body to pass and record resolution directed by the Court *Shepherd v. The Trustees of the Port of Bombay* ... 132
See HUSBAND AND WIFE, Act X of 1866, Sec. 4.

INJUNCTION TO DISCONTINUE.—
See Act X of 1872, Sec. 443.

INJURY SUFFICIENT TO CAUSE DEATH.—See CULPABLE HOMICIDE.

INSPECTION.—See PARTNERSHIP

INSTALMENTS.—See Act XIV of 1859, Sec. 1, Cl. 10.

INTENTION TO CAUSE DEATH.—
See CULPABLE HOMICIDE.

INTENTIONALLY.—See COMPOUND.

INTEREST.—*See* HINDU LAW, 1. ACT (Bom.) I, of 1865, Sec. 2, Cl. (j) and Secs. 36 and 42, Cl. 1st.

INTEREST OF SON IN ANCESTRAL ESTATE.—*See* HINDU LAW, 7, 8.

JOINDER OF CHARGES.—*See* ACT X of 1872, Sec. 452.

JOINT TENANCY.—*See* HINDU LAW, 7, 8. UNDIVIDED HINDU FAMILY.

JOINT TRIAL OF SEPARATE OFFENCES.—*See* ACT X of 1872, Sec. 452.

JURISDICTION—

1. Where a *hundi* had been drawn out of the jurisdiction upon a person within the jurisdiction, indorsed and delivered, out of the jurisdiction, to one who, out of the jurisdiction, indorsed the same, and sent it to a person who, within the jurisdiction, received it, got it accepted, and presented it for payment to the drawee, by whom it was dishonoured within the jurisdiction,

Held that the dishonour of the *hundi* by the drawee within the jurisdiction was a material part of the cause of action by the holder against the first indorser, and consequently that such material part of the cause of action having arisen within the jurisdiction, and the holder having obtained leave to bring his suit under Cl. XII. of the Letters Patent, 1865, the court had Jurisdiction. *Mulchand Johardmal v. Suganchand Shivdas* . 23

2. Where dacoity was committed at Velanpor, a village in the territory of H. H. the Gayakwad, and a Part of the stolen property found where it had been concealed by the accused in British territory, it was

Held that a conviction of dacoity could not be sustained, that being a substantive offence completed as soon as perpetrated at Velanpor; although had Velanpor been in British territory, the subsequent acts in the process of taking away the property might, in the legal sense, have connected with the first and principal one so as to give jurisdiction under Sec. 67 of the

Code of Criminal Procedure in each district into which the property was conveyed. But on a conviction of retaining stolen property, the sentences awarded could, it was held, be sustained, the retaining having taken place in British territory. *Reg. v. Lakhya Govind* 50

3. Where the acts complained of by the plaintiff were committed by the Collector of a district, appointed Municipal Commissioner under Act XXVI of 1860, Section 6, in his official capacity of District Magistrate, and before Bombay Act VI of 1873 came into force,

Held that the Municipal Commissioner was an officer of Government within the meaning of Section 32 of Act XIV of 1869, and ought to be sued in the Court of the District Judge, and not in that of a Subordinate Judge.

Quare—Whether a suit under Bombay Act VI of 1873 must be commenced in the District Court.

Gangadhar Shirkarn v. The Collector of Ahmednagar . 627

See ACT XX of 1864, Secs. 11 and 15. CESSION OF TERRITORY; ACT XXIII of 1871; ACT XIV of 1869, Sec. 24. REVENUE COURTS ACT (Bom.) V of 1862, BOND.

JURY—

The Code of Criminal Procedure, Sec. 263, casts upon the High Court the duty both of Judge and Jury; but notwithstanding this difference, which clothes it with greater powers and responsibilities than the Superior Courts in England, it will, as far as may be, be guided by the principle of English Law, that the verdict of a jury will not be set aside, unless it be perverse and patently wrong, or may have been induced by an error of the Judge. In a proper case, however, the High Court will rectify the verdict of a jury. *Reg. v. Khanderao Bajirao* . 10

See ACT X, of 1875.

KABULAYATDAR KHOT—

Regulation XVII of 1827, Sec. 5, enables the Government and there-

fore the holder of the rights of Government, on failure of the superior holder to pay the land-revenue, to realize it from the inferior holder.

The laws for realizing the land-revenue establish a kind of privity of estate between the superior and inferior holders, by which the latter taking the profits of the land must satisfy the obligations of the former to Government, independently of, and even in opposition to, any agreement between the two contracting parties. The liability to pay adheres to the occupation and enjoyment, and cannot be got rid of, except through its resignation by the sovereign or the sovereign's representatives.

Held, accordingly, that when the person, who was the "occupant" of certain land within the meaning of the Bombay Survey Act, failed to pay the revenue due thereon, the *Kabuldyatadár Khot* might recover the amount from that person's mortgagee in possession. *Krishnaji Ranji Godbole v. Ramchandra Sudashive* 70

KÁZI—

The enactment of Bombay Regulation XXVI of 1827 was adverse to any supposition that the office of Kázi could be hereditary. The repeal of that Resolution by Act XI of 1864 left the Muhammadan Law as it stood before the passing of that Regulation; and that law sanctioned no grant of such an office to a man and his heirs.

The appointment of Kázi lies exclusively with the sovereign, or other chief executive officer of the State, and ought to be made with the greatest circumspection with regard to the fitness of the individual appointed; and though the sovereign may have full power to make the *watan* attached to the office of Kázi hereditary, yet he has, under the Muhammadan Law, no power to make the office itself so.

In the absence of an established local custom to that effect, the office of Kázi is not hereditary. *Quære—*

Whether such a custom would be valid? *Jamal walad Ahmed v. Jamal walad Jallal* 633.

KULKARNI VATAN.—*See* ADOPTION.

LAGNA MARRIAGE.—*See* HINDU LAW, 2.

LAND BELONGING TO GOVERNMENT.—*See* ACT (Bom.) I. of 1865, Sec. 35

LAND IN SALSETTE.—*See* ACT (Bom.) I of 1865, Sec. 35.

LAND RECLAIMED FROM THE SEA—

The plaintiff demised to the defendants for a term of 999 years certain lands, a portion of which, *A*, was liable to an annual rent of Rs. 500 per acre. For the other portion, *B*, which was described in the lease as "being at times covered by the sea," a nominal rent of Re. 1 per acre per annum was reserved. The lease contained a power to the lessees "to reclaim from the sea" the whole or any portion of *B*, and provided that upon such reclamation the lessees should pay for any portion of *B* which they might "reclaim from the sea" an enhanced rent at the rate of Rs. 500 per acre per annum. The lessees also had power under their lease to dig or excavate any portion of the demised lands, and to remove the soil therefrom, the lessees thereupon excavated a portion of *B*, and thus turned it into a dock, at the entrance of which they constructed gates, by means of which they could in a measure, but not entirely, control the flow of sea water into the dock. The defendants charged nothing for the use of the dock, but for the use of the wharves round it they charged a fee.

Held that the expression "to reclaim from the sea" signifying, in its primary and ordinary sense, the conversion of the reclaimed land into dry land, by rendering it secure from the ingress of the sea, with the view to its being used as such, the construction of the dock was not such a reclamation as was

contemplated in the lease, and, therefore, the enhanced rent of Rs. 500 per acre could not be charged for the water area of the dock. *The Secretary of State for India v. Sir Albert Sassoon*. 513

LAND REVENUE—*See* ACTS (Bom) VI of 1862 and I of 1865. KABULAYATDAB KHOT.

LANDS, GRANT OF, BY GOVERNMENT.—*See* ACT XXIII of 1871.

LEAVE AND LICENSE.—*See* RAILWAY COMPANY.

LEPROSY—*See* ACT XLV of 1860, Sec. 494. HINDU LAW, 6.

LETTERS PATENT, 1865—*See* JURISDICTION, 1.

LIBEL—

The Trustees of the Port of Bombay, who are, under the provisions of their Act of Incorporation (Bombay Act I of 1873), bound to keep minutes of their proceedings and resolutions, and to forward copies of such minutes to the Secretary to the Local Government, passed, in relation to the hiring by them to the plaintiff of one of their steamers, the following resolution:—"Mr. Shephard's (the plaintiff's) offer of Rs. 520 in full of all claims should be accepted, but any further transactions with him should be avoided if possible." Copies of this resolution, made by clerks in the employ of the Trustees were recorded in two books kept in the office of the Trustees, and other copies, also made by such clerks, were forwarded to the Secretary to the Local Government and to the plaintiff himself.

Held, 1st, that the words of the resolution amounted in law to a libel.

2nd, that the act of the Trustees, in transmitting a copy to the Secretary to the Local Government, was a publication of the libel.

3rd, that such publication was privileged.

Quære—Whether the giving of the resolution to be copied by clerks of the defendants was a publication.

Held that such a publication was also privileged.

Someli, that had the defendants succeeded on the plea of privilege only, each party should have borne their own costs, but

Held, that as the plaint contained allegations of express malice and want of *bona fides* on the part of the Trustees in passing and publishing the libellous resolution complained of, which allegations obliged the Trustees to plead justification, on which plea also they were successful, the plaintiff must pay the costs of the suit. *Shepherd v. The Trustees of the Port of Bombay*...477 *See* INJUNCTION.

LIMITATION—

1. An application for execution of a decree was made in February 1868, and proceedings sufficient to bar limitation under Act XIV of 1859 were going on till 30th September 1871. The next application for execution of the decree, made in October 1872, was held to be barred under Act IX of 1871, as more than three years had elapsed on that day from the date of the application in February 1868.

Held, also, following *Gouree Sunkur v. Arman Ali* (21 Calc. W. R. 309 Civ. Rul.), that an informal application, made on the 30th September 1871, in the nature of a petition to the Subordinate Judge to give effect to the application of February 1868 by overruling certain objections of the Collector and enforcing execution of the decree was not an application for the execution of a decree such as could bar limitation under Act IX of 1871. *Jibhai Maharipati v. Parbhu Bapu*. 59

2. An Act of Limitation being restrictive of the ordinary right to take legal proceedings, must, where its language is ambiguous, be construed strictly, *i.e.*, in favour of the right to proceed. *Umādhankar Lakshmīram v. Chhotāldāi Kagerām* 19

3. B died, leaving him surviving two widows, K and R. Some time after

on 15th September 1844. Some time before P's birth, a portion of B's *watan* lands had been made over to K by the Revenue authorities. The remaining portion of B's *watan* lands was placed by Government under sequestration, which was not removed until 1865. Shortly after P's birth, R petitioned the Revenue authorities claiming the *watan* lands of B for P as B's son. On 15th February 1849, the Revenue authorities on enquiry held that P was not the son of B, and decided that K was entitled to retain the *watan* lands of B. On 16th March 1872, K adopted a son BA. In a suit brought by P on 4th December 1872 for a declaration that P was the son of B, and for setting aside the adoption of BA by K, BA and K contended that the claim was barred by limitation under Act XIV of 1859.

Held in special appeal that the suit, not being one to recover property, but to set aside the adoption, was within time under that Act. *Kalová konn Bhujangráv v. Padápá walad Bhujangráv* 248

3. Some lands in the village of Shirasgám in the Poona Collectorate, commonly called "Kholhátí Bávás Inám," originally belonged to His Highness Scindia. Plaintiff's family were proved to have been in actual possession of them from 1841 to 1854, and in constructive possession during their attachment by the Inám Commission from 1854 to 1863, when, by a mistake in carrying out the orders of British Government, the lands passed into the possession of Scindia, and remained with His Highness till 1872, in which year the British Government, by exchange of lands, came into possession. In a suit brought on 29th July 1872,

Held that the plaintiff's possession not extending over 30 years, gave him no proprietary title under Section 1 of Regulation V of 1827, which, as a law of positive prescription, is not repealed by Act XIV of 1859. Under the former Limitation Act, 12 years' adverse

possession barred the suit without extinguishing the title: so that if a proprietor who had been out of possession for more than 12 years happened to regain it, the person who had been in adverse possession must fail in any suit to eject the proprietor, unless he sued within six months under Section 15 of the Act. The effect of Act IX of 1872, Section 29, however, is not merely to bar the remedy, but to extinguish the title of the original proprietor after 12 years of a possession adverse to him. *Rámghat Agnihotri v. The Collector of Poona* 592

See Acts XIV of 1859; IX of 1871. *MIRÁS*, 2. Act (Bom.) I of 1865, Sec. 35; Act (Bom.) VI of 1862.

LOSS OF CASTE.—See Act XXI of 1850.

MAGISTRATE.—See Act X of 1872, Secs. 452, 473 and Chap. XXX, CONFESSION, JURISDICTION, 3.

MAINTENANCE.—See HINDU LAW, 2, 6, Act XXI of 1850.

MALICE.—See DAMAGES, LIBEL.

MAMLATDAR'S ORDER.—See REVENUE COURTS.

MARITAL RIGHTS.—See HUSBAND AND WIFE.

MARRIAGE.—See HINDU LAW, 2, 3, HUSBAND AND WIFE, Act XLV of 1860, Sec. 494.

MARRIED WOMAN—

The liability of a Hindu married woman, separated from her husband, for debts contracted without his consent, is limited to the extent of her *Stridhan*. *Nathubhai Bháulál v. Javher Ráji* 121

See HINDU LAW, 2, 3, HUSBAND AND WIFE.

MATERIAL VARIANCE—

The defendant on being shown a document purporting to be the memorandum of Association of a projected Company, signed his name to it, as having taken 4 shares. This

document was not registered as the memorandum of Association of the Company, but another was, which differed from it in omitting, in its 4th clause, the word *yearly* before the word *profits* on which the Company were to pay a certain commission to the Secretaries, Agents, and Treasurers, and in adding to its 6th clause a provision empowering the Company by special resolution in general meeting to subdivide the shares.

Held that the first was not, but the second was, a material variance. *Anandji Visram v. The Nariad Company* 320
See COMPANY PRACTICE, 6.

MEMORANDUM.—See ACTS XX of 1866; VIII of 1871, CONFESSION.

MEMORANDUM OF ASSOCIATION—

Distinction pointed out between the case of a person who agrees to take shares in a projected Company upon the faith of a prospectus, and one who does so upon the faith of a document purporting to be the proposed Memorandum of Association of such a Company. The defendant on being shown a document purporting to be the Memorandum of Association of a projected Company, signed his name to it as having taken 4 shares. This document was not registered as the Memorandum of Association of the Company, but another was, which differed from it in omitting, in its 4th clause, the word *yearly* before the word *profits* on which the Company were to pay a certain commission to the Secretaries, Agents, and Treasurers, and in adding to its 6th clause a provision empowering the Company by special resolution in general meeting to subdivide the shares.

Held that the first was not, but the second was, a material variance. *Anandji Visram v. The Nariad Company* 320
See COMPANY PRACTICE.

MEMORANDUM OF OBJECTIONS.

See ACT VII of 1870, Sec. 18. PRACTICE, 3, 4.

MENS REA.—See BOMBAY ACT IX of 1863.

MIRAS—

1. *B*, a *Mirásdār* addressed a *rázinama* to the *Mámulatdār*, resigning certain *Mirás* land in favour of *I*, (to whom at the same time he delivered possession of the lands), and containing no reservation or qualification.

Held that the transfer to *I* was complete, and the rights of *B* wholly extinguished. *Tirdekhund Pirchand v. Lakshman Bhavani* 91

2. A *Mirásdār* who has given in a *rázinama* is entitled to eject the tenant put in possession of his *mirás* lands by the Collector, provided he sue within the period of limitation, and the *rázinama* contain no stipulation whereby he expressly abandons his *mirás* rights. *Joti Bhimrao v. Balu bin Bapuji* 208

See ACT (Bom.) I of 1865, Sec. 2, Cl. (j), and the Secs. 36 and 42, Cl. 1st.

MORTGAGE—

Plaintiff claimed under a mortgage, dated the 27th November 1871, for Rs. 50, which was neither registered nor accompanied with possession. Defendant claimed under a mortgage, dated the 17th March 1873, for Rs. 150, which was both registered and accompanied with possession. Defendant had no notice, express or constructive, of the plaintiff's previous mortgage. In 1873 plaintiff sued the mortgagor for a money claim, unconnected with the mortgage, and on the 20th February 1874 obtained a decree for Rs. 100. In execution of this money decree the mortgaged property was attached and sold by the Court, at the plaintiff's instance, the defendant becoming the purchaser for Rs. 86 on the 17th September 1874. An unregistered certificate of the Court's sale, bearing date the 29th October 1874, was issued to defendant. In 1874 plaintiff brought a suit on his mortgage (to which suit defendant was not a party), and

obtained a decree (the date of which did not appear in evidence) for possession of the mortgaged property against the mortgagor. In endeavouring to enforce that decree, plaintiff was obstructed by defendant on the 15th January 1875.

Held, that, if it was passed subsequent to the Court's sale of the mortgaged property to defendant on the 17th September 1874, the decree for possession was valueless, as neither the title to, nor the possession of, the mortgaged property was then vested in the mortgagor.

Held, further, that as defendant held no notice of the plaintiff's mortgage when plaintiff caused the Court's sale to be made under his money decree, or that the sale was made subject to the plaintiff's mortgage, it was incumbent on plaintiff, as such money judgment-creditor, to inform defendant, when bidding for the right, title, and interest of the judgment-debtor in the mortgaged property, that the judgment-creditor (plaintiff) held a mortgage on the same property, and intended to enforce it, especially as the mortgage was neither registered nor accompanied with possession, and that the plaintiff having omitted so to inform the defendant was estopped from enforcing his own mortgage against the defendant. *Itchārām Dayārām v. Ruij's Jaga* (11 Bom. H. C. Rep. 41) distinguished. *Tukārām bin Atmārām v. Rāmdāchandra Budharam*. . . 314

See EQUITABLE MORTGAGE, REGISTRATION, ACT XX of 1866, Sec. 17, Cls. 2 and 3.

ACT VII of 1870, Sched. I, Cl. 11.
ACT XXIII of 1871, Act (Bom.) V of 1862.

MORTGAGE OF MIRĀSĪ LAND.—*See* ACT I (Bom.) of 1865 Sec. 2, Cl. (7), and Secs. 36 and 42, Cl. 1st.

MOTION TO DISCHARGE OR VARY COMMISSIONER'S REPORT.—*See* ACCOUNTS.

MOVEABLE PROPERTY.—*See* HINDU LAW.

MUHAMMADAN LAW.—*See* KĀZĪ.

MUNICIPAL COMMISSIONER.—*See* JURISDICTION, 3.

MURDER.—*See* CULPABLE HOMICIDE, ACT X of 1872, Sec. 288.

NARVADARI.—*See* BOMBAY ACT V of 1862.

NEW TRIAL.—*See* ACT X of 1872, Sec. 288.

NOTES OF JUDGMENT IN DEPUTY REGISTRAR'S BOOK.—*See* ACCOUNTS DECREE, 2.

NOTICE.—*See* MORTGAGE. REGISTRATION. VENDOR AND PURCHASER.

NOVATION.—*See* ACT IX of 1871, Sched. II, Cl. 72, and Cls. 166 and 167; ACT IX of 1871, Sec. 20.

NUISANCE.—*See* ACT X of 1872, Sec. 473.

NUNCUPATIVE WILL.—*See* HINDU LAW, 9.

OBJECTIONS, MEMORANDUM OF.—*See* ACT VII of 1870, Sec. 16, PRACTICE, 3, 4.

OCCUPANT.—*See* ACT (Bom.) I of 1865, Sec. 2, Cl. (j), and Secs. 36, and 42, Cl. 1st., KABULĀYATDĀR KHOT.

OFFENCES, SEVERAL.—*See* ACT X of 1872, Secs. 215, 314, 452.

OFFICER OF GOVERNMENT.—*See* ACT XX of 1864, Secs. 11 and 15.

OFFICIAL ACT.—*See* ACT X of 1872, Sec. 209. JURISDICTION, 3.

ORDER FOR DISPOSAL OF STOLEN PROPERTY. *See* ACT X of 1872, Chap. XXX.

OUT-CASTE.—*See* ACT XXI of 1850.

OUTSTANDINGS.—*See* HINDU LAW, 8.

OWNERSHIP IN THE SOIL.—*See* ACT XXIII of 1871, Secs. 3, 4, and 6.

PARDON.—*See* ACT X of 1872, Sec. 347.

PAROL AGREEMENT.—*See* ACT I of 1872, Sec. 92.

Parsi SUCCESSION.—*See* ACT XXI of 1865.

PARTITION—

A plaintiff entitled on partition to half the property in the hands of his brother is bound to bring into hotch-pot any ancestral property, or property acquired from ancestral funds which may be in his own hands, but is not liable to account for money received by him from his father while living in commensality with him and his brother, the circumstances of such receipt not being of a kind to impute fraud.

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In a partition suit, the Court ought not to order an immediate money payment by the defendant to the plaintiff of his share in the outstanding debts due to the family estate, as if such outstanding debts had been recovered and the money were in the hands of the defendant.

As a member of an undivided Hindu family is not bound to effect a partition by paying a certain sum of money to his coparceners, the Court in a partition suit ought not to award interest on money decreed to be paid by the defendant to the plaintiff. *Lakshman Dadd Nalk v. Ramchandra Dadd Nalk* ...561

See HINDU LAW, 8 BOMBAY ACT V of 1862, UNDIVIDED HINDU FAMILY.

PARTITION, DEED OF.—*See* ACT XX of 1866, Sec. 17.

PARTNERSHIP—

One partner of a firm represents the other partners for the purposes of production of documents.

Therefore, where the plaintiff, alleging that he had been a partner with the defendant and others, in the firm of Ibrahim Kadu and Co. and that on the dissolution of that firm

the amount then standing to his credit in the partnership books had been carried to his credit in the books of a new firm, in which he and the defendant only were partners, applied for an order on the defendant to produce, for the plaintiff's inspection, the books of Ibrahim Kadu and Co., which application was resisted by the defendant, on the ground that the other partners in the firm of Ibrahim, Kadu and Co., had an interest in those books and were not parties to the present application, or shown to have consented to it,

Held that the plaintiff was entitled to the order. *Haji Jakaria v. Haji Kasm* 496

See CONTRACT OR PARTNERSHIP, ACT X of 1866, Sec. 4.

PATIL.—*See* ACT XXIII of 1871.

PAT MARRIAGE.—*See* HINDU LAW, 2.

PAUPER—

A pauper respondent is not entitled to present objections at the trial of an appeal without payment of stamp duty. *Babaji Hari v. Rajaram Ballat* 75

PAUPER SUIT.—*See* COURT FEES.

PAYMENT.—*See* ACTS XIV of 1859, Sec. 1, Cl. 10; XX of 1866, Sec. 17; VIII, of 1871, Sec. 17. EVIDENCE, 2.

PENAL CODE.—*See* ACT XLV of 1860.

PENAL STATUTE.—*See* ACT XXXI of 1860, Sec. 32, Cl. 6.

PENSIONS.—*See* ACT XXIII of 1871.

PLAINT.—*See* ACT XIV of 1869, Sec. 24.

PLEADING.—*See* PRACTICE, 6.

POINT NOT TAKEN IN LOWER COURTS.—*See* PRACTICE 5.

POLICE OFFICER.—*See* ACT X of 1872, Sec. 157.

POSSESSION—

Upon a sale in execution of a decree the property in the thing sold passes to the purchaser, and there is

nothing in either the Hindu or the English Law which debars a third person from taking an assignment of such property from the auction-purchaser, albeit it has not been reduced into possession by him
Govind Ragunath v. Govind Jagogi
500

See BOMBAY ACT IX of 1863.
MORTGAGE. LIMITATION. ACT X
of 1872. Sec. 462, REVENUE
COURTS.

POWER OF COMPANY TO SUB-
DIVIDE SHARES.—See COMPANY.

POWER OF CROWN TO CEDE
TERRITORY.—See CESSION OF
TERRITORY.

POWER OF GOVERNMENT TO
FRAME RULES UNDER THE
BOMBAY SURVEY ACT.—See ACT
I (Bom.) 1865, Sec. 35.

—TO PROHIBIT ADOPTION.
—See ADOPTION.

POWER OF GOVERNOR GENERAL
TO LEGISLATE.—See CES-
SION OF TERRITORY.

POWER OF HIGH COURT TO
ALTER FINDING.—See ACT X of
1872, Sec. 288, JURY.

POWER OF A HINDU TO MAKE
A WILL.—See HINDU LAW, 8, 9.

PRACTICE—

1. A clerical error in the decree ap-
pealed against was ordered to be
amended at the hearing of the ap-
peal. *Hirji Jina v. Naran Mulji*
(note) 3
2. Counsel cannot claim as of right
to be heard on a reference to the
High Court under Section 296 of
the Criminal Procedure Code. *Reg.*
v. Devama 64
3. A pauper respondent is not entitled
to present objections at the trial
of an appeal without payment of
stamp duty. *Babaji Hari v. Raju-
ram Ballal* 75
4. In moving to discharge or vary
the report of the Commissioner for
taking accounts, the right practice
is to move on a memorandum of

objections filed in the Prothono-
tary's office, and upon the evidence
taken by, and the proceedings
before, the Commissioner, and not
on affidavits made for the purpose
of the motion. In such a motion
affidavits should only be filed (a)
when ordered by the Court, if it
desire fresh evidence; or (b) by
special leave of the Court for the
purpose of advancing a fact which
does not appear on the face of the
proceedings before the Commis-
sioner. *Sumar Ahmed v. Haji Is-
mail Haji Habib* 158
See ACCOUNTS.

5. A point not taken in either of the
Lower Courts was disallowed as
being too late when taken for the
first time at the hearing of the
special appeal. *Mahadaji v. Vyana-
kaji Govind* 197
6. Sec. 123 of the Civil Procedure
Code contemplates that a defendant
shall, in his written statement, set
forth the case he intends to make
at the trial.

The rule followed in *Eshenchunder
Singh v. Shammachurn Bhutto* (11
Moore I. A. 7), *Mohummud Zahoor
Ali Khan v. Mussamut Thakoo-
rahee Kutta Koer* (11 Moore I.
A. 468) and *Narainee v. Nurrokhury*
(Marsh, 70), that a plaintiff must
be held to the state of facts and
equities alleged and pleaded by him
in his plaint, or involved in or con-
sistent therewith, applies also to the
case made on the pleadings by a
defendant.

Therefore, where the defendant in a
suit in ejectment averred in his
written statement that the land in
dispute was in fact his, but had
previously to 1865 been encroached
on by the plaintiff, who, in 1865,
was about to erect a building there-
on, and that the defendant then,
in order to avoid litigation, com-
promised the dispute by payment
to the plaintiff of a sum of money,
and purchased the land, and had
since then remained in possession
of it.

Held that the only defence open to
the defendant was that of purchase
and that he could not be allowed,

at the trial to prove a case of continuous user and possession adverse to the plaintiff commencing before 1865. *Chona Kara v. Isabin Khatlifa* 200
See LIBEL.

PREROGATIVE OF THE CROWN
—See COURT FEES. CESSION OF TERRITORY.

PRESCRIPTION.—See ACT (Bom) VI of 1862, ACT (Bom) I of 1865, Sec. 35, LIMITATION.

PRINCIPAL.—See ABETMENT, ACT VIII of 1859, Sec. 2.

PRIORITY.—See MORTGAGE, REGISTRATION, ACT (Bom) I of 1865, Sec. 2.

PRISONER NOT A EUROPEAN BRITISH SUBJECT.—See ACT X of 1875, Secs. 32, 37.

PRIVILEGE.—See LIBEL.

PRIVITY OF ESTATE.—See KALU-LĀYATDĀR KHOT.

PROBATE—

Where the property in respect of which probate is sought is mortgaged, the amount of the mortgage incumbrance must be deducted from the market value of the property, and the probate fee charged on the balance. *In re Will of Rámchandra Lakhsumanji* 118
See ACT VII of 1870, Sched. I, Cl. 11.

PROCEDURE.—See ACT XIV of 1869, Sec. 24.

PRODUCTION OF DOCUMENTS.—
See PARTNERSHIP.

PROHIBITION BY GOVERNMENT.—See ADOPTION.

PROMISE.—See ACT IX of 1871, Sec. 20.

PROMISSORY NOTE.—See ACT XIV of 1859, Sec. 1, Cl. 10; ACT IX of 1871, Sched. II, Cl. 72.

PROOF OF CESSION.—See CESSION OF TERRITORY.

PROPERTY ALLEGED TO BE STOLEN.—See ACT X of 1872, Chap. XXX.

PROSECUTION, REVIVAL OF.—
See ACT X of 1872, Sec. 215.

PROSECUTION, SANCTION FOR.—
See DECREE OF SMALL CAUSE COURT.

PROSPECTUS—

Distinction pointed out between the case of a person who agrees to take shares in a projected company upon the faith of a prospectus, and one who does so upon the faith of a document purporting to be the proposed Memorandum of Association of such a company. *London & Lancashire v. The Newbold Company* 320
See COMPANY.

PUBLICATION.—See LIBEL.

PUBLIC OFFICERS, ACT OF.—See JURISDICTION, 3.

PUNARBHU.—See HINDU LAW, 2.

QUALIFICATION FOR THE OFFICE OF A KAZI.—See KAZI.

RAILWAY COMPANY.—

The plaintiff entered a carriage on the defendants' railway at Surat with the purpose of proceeding to Bombay. By an oversight, and without any fraudulent intent, he omitted to procure a ticket at Surat. On arriving at Nowshari he applied to the station-master for a ticket to Bombay, but was refused; he was, however, allowed by the defendants' servants to proceed in the same train to Bulsar, where he again applied for a ticket, and was again refused, but was directed by the defendants' servants to get into the train and not leave it again. At Dhandu he again got out and applied for a ticket to the station-master. During a discussion between the plaintiff's master and the station-master, the plaintiff, at the direction of his master, re-entered the train. Ultimately the station-master refused to give the plaintiff a ticket, and ordered him to get out of the train; and, on his not complying with this order, sent a sepoy, who forcibly removed the plaintiff from the carriage. In an action by the plaintiff to recover damages for the tortious and illegal

removal of the plaintiff from the carriage, and for the illegal detention of the plaintiff at the station at Dhāndu, and for the illegal refusal of the defendants to allow the plaintiff to proceed in the train to Bombay,

Held, 1st, that the latter portion of Sec. 2 of Act XXV of 1871, amending Sec. 1 of Act XVIII. of 1854, which provides for payments to be made by persons failing to produce their tickets when demanded by the servants of the Company, applies only to the case of a person who has received a ticket, and will not or cannot produce it, and not to a person travelling without having obtained a ticket with no intention to defraud;

2nd—That the absence of a fraudulent intention did not make the entry into the carriage less unlawful, and consequently that the plaintiff started from Surat as a trespasser;

3rd—That the conduct of the railway officials at the stations intermediate between Surat and Dhāndu, if it amounted at all to have and licence to the plaintiff to proceed without a ticket, could only operate as such until the train stopped at the next station;

4th—that there was no legal obligation on the station master to issue a ticket to the plaintiff to enable him to proceed from Dhāndu. *Pratib Ditta v. The Bombay, Bar. & Central India Railway Company* 25

RAZIANAM &c.—*See* MIRCAS. Act (Bom.) I of 1865, Sec. 2, Cl. C), and Secs. 36 and 4., Cl. 1st

REARRANGING OF JURISDICTION WITHIN BRITISH TERRITORY.—*See* Cession of Territory.

RECEIPT.—*See* ACTS XX of 1866; VIII of 1871. *BOMB.*

RECLAMATION.—*See* LAND RECLAIMED FROM THE SEA.

RECOVERY OF BARRED DEBT.—*See* ACT IX of 1871, Sec. 20.

REFERENCE. *See* ACT X of 1872, *See* *VER* PRACTICE.

REFERENCE OF DECREE FOR EXECUTION.—*See* DECREE OF SMALL CAUSE COURT.

REGISTRATION—

A mortgage deed registered under Act XX of 1866 is not thereby entitled to priority over a mortgage deed which might have been, but was not, registered under Act XIX of 1843, in cases where the consideration for the rival deeds exceeds Rs. 100. *Maleshappá v. Bessappá* (1 Bom. H. C. Rep. 10), *Harnamgir v. Spiers* (2 Bom. H. C. Rep. 204), and *Parabhuddás v. Dhondú* (2 Bom. H. C. Rep. 222) distinguished.

Quære—Whether in the case of instruments executed for a consideration less than Rs. 100, Sec. 50 of Act XX of 1866 would operate to give priority to the deed registered under that Act over the deed which might have been, but was not, registered under Act XIX of 1843. *Khandu Dulabddás v. Tārāchand Amarchand* ... 574

See COMPANY ACT X of 1866, Sec. 4, and ACTS XX of 1866, and VIII of 1871.

REGULATION V OF 1827.—*See* LIMITATION ACT (Bom.) I of 1865, Sec. 35.

————XVII OF 1827.—*See* KABU-LAXATDAR KHOT.

————XXVI of 1827.—*See* KÁZI.

RELIEF.—*See* DECLARATORY DECREE.

RE-MARRIAGE.—*See* HINDU LAW, 2.

RENT-FREE LAND.—*See* ACT (Bom.) VI of 1862.

REPORT OF COMMISSIONER.—*See* ACCOUNTS.

RES JUDICATA.—*See* ACT VIII of 1859, Sec. 2. REGISTRATION, REVENUE COURTS.

RESTITUTION OF CONJUGAL RIGHTS.—*See* HUSBAND AND WIFE.

RETAINING STOLEN PROPERTY.—*See* JURISDICTION, 2.

RETURN OF PLAINT.—*See* ACT XIV of 1869, Sec. 24.

REVENUE COURTS—

A Mámlatdár's order under Bombay Act V of 1864 is not conclusive evidence of the facts of possession and dispossession between the parties. Sec. 1 of that Act gives to Mámlatdárs' Courts jurisdiction in case of dispossession within six months from the date of such dispossession, and relates to immediate possession; and under Sec. 15, the party to whom such immediate possession is given by the Mámlatdár, or whose possession he shall maintain, shall continue in possession until ejected by a decree of a Civil Court.

The power reserved to the Revenue Courts by Sec. 1, Cl 2, of Act XVI of 1838, to determine the facts of possession and dispossession, was so reserved merely for the temporary purpose of enabling those Courts to dispose of the immediate possession, which was to continue until the Civil Court ejected the party put into such immediate possession. The purpose of Act XVI of 1838, as that of Bombay Act V of 1864, was temporary only, and chiefly to provide for the cultivation of the land and to prevent breaches of the peace until the Civil Court should determine the rights of the disputants. The decisions of the Revenue and the Mámlatdárs' Courts as to possession and dispossession do not bind the Civil Courts, the proceedings in the former Courts being of a summary-character. The Civil Courts alone can entertain the question of title. *Basapa bin Murtápdá v. Lakshmapá bin Murtámapá* 624

REVENUE RULES.—See Act (Bom.) I of 1865, Sec. 35.

REVERSAL BY THE HIGH COURT OF A VERDICT BY A JURY.—See JURY.

REVERSAL BY THE MAGISTRATE OF THE DISTRICT OF ORDER BY THE 2ND CLASS MAGISTRATE FOR DISPOSAL OF PROPERTY ALLEGED TO BE STOLEN.—See Act X of 1872, Chap. XXX.

REVIEW—

A review may be admitted on any ground, whether urged at the original hearing of the appeal or not, whenever the Court considers that it is necessary to correct an evident error or omission, or is otherwise requisite for the ends of justice, following *Chintámanipál v. Panari Mohun Mookerjee* (6 Beng. L. R. 126) *Kálu v. Vishám* 543
See Act XIV of 1869, Sec. 24, Cl. 2.

REVIVAL OF PROSECUTION.—See Act X of 1872, Sec. 215.

"RIGHT."—See Act XXIII, of 1871.

RIGHT OF CO-PARTNERS.—See CONTRACT OF PARTNERSHIP.

RIGHT TO LEVY ASSESSMENT.—See Act VI (Bom.) of 1862.

RIGHT TO OFFICIATE.—See Act XXIII of 1871.

RULES OF THE SUPREME COURT.—See Act IX of 1871, Sched. II, Cl. 58.

SALE IN EXECUTION.—See POSSESSION.

SALE OF ANCESTRAL PROPERTY BY THE COURT.—See HINDU LAW, 7.

SALE OF A CO-PARCENER'S INTEREST.—See UNDIVIDED HINDU FAMILY.

SALE OF UNRECOGNIZED PORTION.—See Act (Bom.) V. of 1862.

SAN MORTGAGE.—See Act (Bom.) V of 1862, Secs. 1 and 3.

SANAD.—See Act XXIII of 1871, Secs. 3, 4, and 6.

SANCTION FOR PROSECUTION.—See DECREE OF SMALL CAUSE COURT.

SENTENCE—

1. In a case of conviction of house-breaking by night, in order to commit theft, under Sec. 457, and theft, under section 380 of the Indian Penal Code, there may either be one sentence for both offences, or separate sentences for each offence.

provided that the total punishment awarded does not exceed that which may be given for the graver offence. *Reg. v. Tukayá bin Tamáná* . 214

2. The aggregate of the sentences passed under Sec. 314 of the Code of Criminal Procedure in a case of simultaneous convictions for several offences, must be considered a single sentence for the purposes of confirmation or appeal. *Reg. v. Rámá Bhogvada* . 228
See Act XXXI of 1860, Sec. 32, Cl. 6; Act X of 1872.

SERVICE.—See Act (Bom.) VI of 1862.

SEVERAL OFFENCES.—See Act X of 1872, Sec. 314.

SETTLEMENT OFFICER.—See Act (Bom.) VI of 1862.

SHARES.—See COMPANY.

SHROFFS, USAGE OF.—See HUNDI.

SIGNATURE.—See Act X of 1865, Sec. 50, Cl. 3.

SIMULTANEOUS CONVICTIONS.—See Act X of 1872, Sec. 314. SENTENCE.

SMALL CAUSE COURT.—See DECREE OF SMALL CAUSE COURT.

SOLICITOR.—See Act IX of 1871 Sched. II., Cl. 85.

SON'S INTEREST IN ANCESTRAL ESTATE.—See HINDU LAW 7.

SPECIAL APPEAL.—See PRACTICE, 5

STAMP.—See PAUPER. COURT FEES Act VII of 1870.

STARVING MAINTENANCE.—See Act XXI of 1850.

STATUTES 3 and 4, Will. IV, Cap. 85, Sec. 43; 24 and 25 Vic., Cap. 67, Sec. 22; and 24 and 25 Vic., Cap. 104, Sec. 9.—See CESSION OF TERRITORY, Vic., Cap. 26, Sec. 9.—See Act X of 1865, Sec. 50, Cl. 3.

STOLEN PROPERTY.—See Act X of 1872, Chap. XXX. JURISDICTION, 2.

STRIDHAN.—See HINDU LAW, 3.

SUBORDINATE JUDGE.—See Act XIV of 1869, Sec. 24.

SUCCESSION.—See HINDU LAW, 2, 4, 5, 6, 7, 8, 9, Act XXI of 1865.

SUDRAS.—See HINDU LAW, 2.

"SUIT."—See Act IX of 1871, Sched. II, Cl. 85.

SUIT FOR A DECLARATION OF PLAINTIFF'S RIGHT TO OFFICIATE AS PATIL. See Act XXIII of 1871, Secs. 3, 4, and 6.

SUIT IN FORMA PAUPERIS.—See COURT FEES.

SUIT TO ENFORCE EXECUTION OF DECREE.—See Act XXIII of 1871.

SUIT TO SET ASIDE ADOPTION—

B died, leaving him surviving two widows, K and R. Some time after B's death, P, a son, was born to R on 15th September 1848. Some time before P's birth a portion of B's *watan* lands had been made over to K by the Revenue authorities. The remaining portion of B's *watan* lands was placed by Government under sequestration, which was not removed until 1865. Shortly after P's birth, R petitioned the Revenue authorities, claiming the *watan* lands of B for P as B's son. On 15th February 1849, the Revenue authorities on enquiry held that P was not the son of B, and decided that K was entitled to retain the *watan* lands of B. On 16th March 1872, K adopted a son BA. In a suit brought by P on 4th December 1872 for a declaration that P was the son of B, and for setting aside the adoption of BA by K, BA and K contended that the claim was barred by limitation under Act XIV of 1859.

Held in special appeal that the suit, not being one to recover property, but to set aside the adoption, was within time under that Act.

Held, also, that under the circumstances a suit for a declaratory decree would lie; for the plaintiff, even if his claim to the property were barred as against K, would yet be entitled to obtain an injunction against any intervention of BA in

performing the *shrāddh* or other ceremonies for the benefit of B, or assuming the *status* of B's adopted son, and, moreover, the Legislature has, in Act VII of 1870 and Act IX of 1871, recognized the right of a person to bring a suit to set aside an adoption as a substantive proceeding, independent of any claim to property. *Kalonī kom Bhujangrāv v Padopa walad Bhujangrāv* . 218

SUPERIOR HOLDER.—*See* KABT-LAYATDAR KHOT.

SUPREME COURT RULES.—*See* ACT IX of 1871, Sched. II, Cl. 85.

SURVEY ACT.—*See* ACT (Bom.) I of 1865, Sec. 35.

TALUKDARI ACT.—*See* ACT (Bom.) VI of 1862.

TELLI CASTE.—*See* ACT XLV of 1860, Sec. 494.

TENANCY IN COMMON.—*See* UNDIVIDED HINDU FAMILY.

TERRITORIAL JURISDICTION OF BRITISH COURT CEASES ON CESSION.—*See* CESSION OF TERRITORY.

TESTAMENTARY POWER.—*See* HINDU LAW, 8, 9.

THEFT—

Possession of wood by a forest inspector, who is a servant of Government, is possession of the Government itself; and a dishonest removal of it, without payment of the necessary fees, from his possession, albeit with his actual consent, constitutes theft within the meaning of Sec. 378 of the Indian Penal Code, if that consent was unauthorized or fraudulent. *Reg. v. Hanmanta* . . 610
See ACT X of 1872, Sec. 452.

TKET.—*See* RAILWAY COMPANY.

TL.—*See* ACT I (Bom.) of 1865, Sec. 5. POSSESSION, REVENUE COURTS. ACT XLV of 1860, Sec. 24, LIMITATION. MIRAS. MORTGAGE.

TL.—*See* DEEDS. *See* EQUITABLE

TODA GRAS.—*See* ACT XXIII of 1871.

TRANSFER OF JURISDICTION.—*See* CESSION OF TERRITORY.

TRESPASS.—*See* RAILWAY COMPANY.

TRIAL BY JURY.—*See* ACT X of 1875. JURY.

TRIAL IN BRITISH TERRITORY.—*See* ACT X of 1872, Sec. 67. JURISDICTION, 2.

ULTRA VIRES.—*See* ADOPTION. CESSION OF TERRITORY. COMPANY. ACT (Bom.) I of 1865, Sec. 58 INJUNCTION.

UNDIVIDED HINDU FAMILY—

In a suit by a member of an undivided Hindu family to have his right declared to a portion of the joint estate which had been sold by the Civil Court in execution of a decree against his co-parcener alone,

Held that the plaintiff should have a decree declaring that he was entitled to joint possession along with the execution purchaser as tenant in common. But that, if a division in *specie* were desired, a suit should be brought for that purpose. *Mahabulaya v. Timaya* (12 Bom. H. C. Rep. 138) followed. *Bābāji Lakshman v. Vāsudev Fināyakh* . 95
See HINDU LAW, 7, 8.

UNEQUAL DISTRIBUTION OF ANCESTRAL MOVEABLE PROPERTY.—*See* HINDU LAW, 8.

UNRECOGNIZED PORTION MORTGAGED BEFORE THE PASSING OF BOMBAY ACT V OF 1862.—*See* ACT (Bom.) V of 1862, Secs. 1 and 3.

USAGE OF SHROFFS.—*See* HUNDI.

USAGE OF TRADE.—*See* ACT VIII of 1859, Sec. 2.

VALUATION OF SUIT.—*See* ACT XIV of 1869, Sec. 24.

VALUE.—*See* ACT (Bom.) I of 1865, Sec. 35; HINDU LAW, 7, 8, ACT VII of 1870, Sched. I, Cl. II.

VARIANCE.—*See* COMPANY. PRAC-

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See Act X of 1872, Sec. 452.

TICKET.—*See* RAILWAY COMPANY.

TITLE.—*See* Act I (Bom.) of 1865, Sec.

7. POSSESSION, REVENUE COURTS. Act XIV of 1869, Sec. 24, LIMITATION. MIRAS. MORTGAGE.

WILL. DEEDS. *See* EQUITABLE MORTGAGE.

TODA GRAS.—*See* Act XXIII of 1871.

TRANSFER OF JURISDICTION.—*See* CESSION OF TERRITORY.

TRESPASS.—*See* RAILWAY COMPANY.

TRIAL BY JURY.—*See* Act X of 1873. JURY.

TRIAL IN BRITISH TERRITORY.—*See* Act X of 1872, Sec. 67. JURISDICTION, 2.

ULTRA VIRES.—*See* ADOPTION. CESSION OF TERRITORY. COMPANY. Act (Bom.) I of 1865, Sec. 38. INJUNCTION.

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See HINDU LAW, 7, 8.

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UNRECOGNIZED PORTION MORTGAGED BEFORE THE PASSING OF BOMBAY ACT V OF 1862.—*See* Act (Bom.) V of 1862, Secs. 1 and 3.

USAGE OF SHROFFS.—*See* HUNDI.

USAGE OF TRADE.—*See* Act VIII of 1859, Sec. 2.

VALUATION OF SUIT.—*See* Act XIV of 1869, Sec. 24.

VALUE.—*See* Act (Bom.) I of 1865, Sec. 35; HINDU LAW, 7, 8, Act VII of 1870, Sched. I, Cl. 11.

VARIANCE.—*See* COMPANY. PRAC-

VENDOR AND PURCHASER—

The reason for the rule of equity that a purchaser of property, though for valuable consideration, yet with notice of a prior incumbrancer, purchases subject to such incumbrance, is that such purchaser is acting *mala fide* in taking away the right of the prior incumbrancer by getting the legal estate, while knowing that a prior purchaser has the right to it. But a purchaser for valuable consideration, without notice of the prior right of a third person, is not guilty of, or party to a fraud, upon the rights of a prior purchaser. The Courts of Equity, therefore, will not interfere with his right to the possession, enjoyment, and disposal of the property; and though, subsequently to his purchase, he may become aware of the prior incumbrance, yet he has the right to convey to a subsequent purchaser, who at the time of such subsequent conveyance, has notice of the prior right of the third person; and such subsequent purchaser will take the property free from the incumbrance, for neither is he guilty of any fraud in accepting what his vendor had a right to convey, nor would the *bona fide* purchaser without notice be able, otherwise freely and completely to dispose of the property which he innocently acquired. On the same principles, any subsequent purchaser, however revote, though having notice, must be protected.

Where, therefore, the 2nd defendant, having notice of the plaintiff's equitable mortgage, purchased from one, who also with such notice, had purchased from a *bona fide* purchaser for value without notice.

Held that the 2nd defendant held the property free from the equitable

mortgage. *Carter v. Carter* (3 K. & Johns. 617) distinguished. *Dayál Jurdj v. Jauráj Ratansi* . 237
See Act (Bom.) I of 1865, Sec. 2.

VERDICT.—See JURY.

VILLAGE OFFICER.—See ACT XXIII of 1871.

VOLUNTARILY CAUSING GRIEVOUS HURT—See COMPOUNDING OF OFFENCES.

WAIVER—

Where the defendant executed to the plaintiff a bond for the payment of the balance found to be due from the defendant to the plaintiff upon an adjustment of the account of their mutual dealings,

Held that though the defendant, at the time of the adjustment, disputed the correctness of the account, yet that by having executed the bond and made payments under it, he must be held to have waived his objection.

Naráyan Undir Pátíl v. Motilla Rámdás . 45
See Act XIV of 1859, Sec. 1, Cl. 10.

WARRANT.—See ACT X of 1872, Sec. 157.

WARRANT CASE, DISMISSAL OF —See ACT X of 1872, Sec. 215.

WIFE—See HUSBAND AND WIFE. HINDU LAW, 2, 3.

WILL.—See ACT X of 1865, Sec. 50, Cl. 3; HINDU LAW, 8, 9; ACT VII of 1870, Sched. I, Cl. II.

WILLS ACT I Vic., Cap. 26, Sec. 9
See ACT X of 1865, Sec. 50.

WRITTEN STATEMENT.—See ACT VIII of 1859, Sec. 119, PRACTICE 6.

